DOCKET

No. 13-1041
Vide 13-1052

Title:	Thomas E. Perez, Secretary of Labor, et al., Petitioners
	v.
	Mortgage Bankers Association, et al.
Docketed:	March 3, 2014
Linked with 13A636	
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(12-5246)
Decision Date:	July 2, 2013
Rehearing Denied:	October 2, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~
Dec 18 2013	Application (13A636) to extend the time to file a petition for a writ of certiorari from December 31, 2013 to January 30, 2014, submitted to The Chief Justice
Dec 19 2013	Application (13A636) granted by The Chief Justice extending the time to file until January 30, 2014.
Jan 17 2014	Application (13A636) to extend further the time from January 30, 2014 to February 28, 2014, submitted to The Chief Justice.
Jan 21 2014	Application (13A636) granted by The Chief Justice extending the time to file until February 28, 2014.
Feb 18 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent. VIDED.
Feb 28 2014	Petition for a writ of certiorari filed. (Response due April2, 2014)
Mar 24 2014	Order extending time to file response to petition to and including May 2, 2014.
Mar 26 2014	Brief amici curiae of Administrative Law Scholars filed. VIDED.
May 2 2014	Brief of respondent Mortgage Bankers Association in opposition filed. VIDED.
May 20 2014	DISTRIBUTED for Conference of June 5, 2014.
May 21 2014	Reply of petitioner Thomas E. Perez, Secretary of Labor filed. (Distributed)
Jun 9 2014	DISTRIBUTED for Conference of June 12, 2014.
Jun 16 2014	Petition GRANTED The petition for a writ of certiorari in No. 13-1052 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jun 26 2014	Motion to dispense with printing the joint appendix filed by petitioner Thomas E. Perez, Secretary of Labor.
Jul 7 2014	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including August 13, 2014. VIDED

Jul 7 2014	The time to file respondents' brief(s) on the merits is extended to and including September 25, 2014. VIDED
Jul 21 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Aug 11 2014	The time to file the joint appendix and petitioner's briefs on the merits is further extended to and including August 20, 2014. VIDED
Aug 11 2014	The time to file respondents' brief(s) on the merits is further extended to and including October 9, 2014. VIDED
Aug 20 2014	Brief of petitioners Thomas E. Perez, Secretary of Labor, et al. filed. VIDED.
Aug 20 2014	Brief of petitioners in No. 13-1052, Jerome Nickols, et al. filed.
Sep 4 2014	SET FOR ARGUMENT on Monday, December 1, 2014. VIDED
Sep 9 2014	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the respondents. VIDED
Sep 22 2014	Record requested from U.S.C.A. Dist. of Columbia Circuit.
Sep 26 2014	Record received from U.S.D.C. Dist. of Columbia Circuit. The record is electronic and located on PACER.
Oct 9 2014	Brief of respondents Mortgage Bankers Association, et al. filed. VIDED.
Oct 16 2014	Brief amicus curiae of National Mining Association filed. VIDED.
Oct 16 2014	Brief amici curiae of National Federation of Independent Business, et al. filed. VIDED.
Oct 16 2014	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed. VIDED.
Oct 16 2014	Brief amici curiae of Cato Institute, et al. filed. VIDED.
Oct 16 2014	Brief amici curiae of American Hospital Association, et al. filed. VIDED.
Oct 16 2014	Brief amici curiae of Utility Air Regulatory Group and American Forest & Paper Association filed. VIDED.
Oct 16 2014	Brief amicus curiae of Quicken Loans Inc. filed. VIDED.
Oct 16 2014	Brief amicus curiae of Thomas Jefferson Institute for Public Policy filed. VIDED.
Oct 16 2014	Brief amicus curiae of Center for Constitutional Jurisprudence filed. VIDED.
Oct 16 2014	Motion for divided argument filed by petitioners Jerome Nickols, et al. VIDED.
Oct 16 2014	Brief amici curiae of State and Local Government Associations filed. VIDED. (Distributed)
Oct 16 2014	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. VIDED.
Oct 27 2014	CIRCULATED.
Oct 28 2014	Opposition of petitioners Perez, et al. to motion of Nickols, et al. for divided argument filed. VIDED
Nov 10 2014	Motion for divided argument filed by petitioners Jerome Nickols, et al. DENIED.
Nov 10 2014	Reply of petitioners Thomas E. Perez, Secretary of Labor filed. VIDED. (Distributed)
Nov 10 2014	Reply of petitioners in No. 13-1052, Jerome Nickols, et al., filed. (Distributed)
Dec 1 2014	Argued. For petitioners: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Allyson N. Ho, Dallas, Tex.
Mar 9 2015	Judgment REVERSED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined, and in which Alito, J., joined except for Part III-B. Alito, J., filed an opinion concurring in part and concurring in the judgment. Scalia, J., and Thomas, J., filed opinions concurring in the judgment. VIDED

Apr 10 2015 JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13-1041

No.

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, generally provides that "notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. 553(b), and, if such notice is required, the rulemaking agency must give interested persons an opportunity to submit written comments, 5 U.S.C. 553(c). The APA further provides that its notice-and-comment requirement "does not apply * * * to interpretative rules," unless notice is otherwise required by statute. 5 U.S.C. 553(b)(A). No other statute requires notice in this case. The question presented is:

Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

PARTIES TO THE PROCEEDING

Petitioners are Thomas E. Perez, Secretary of Labor; the Department of Labor; and Laura A. Fortman, Principal Deputy Administrator, Wage and Hour Division, Department of Labor.

Respondent Mortgage Bankers Association was plaintiff-appellant below.

Respondents Beverly Buck, Ryan Henry, and Jerome Nickols were intervenors-appellees below.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 9
A. The court of appeals erred in holding that an interpretive rule that alters the agency's previous interpretation of a substantive regulation must be promulgated through notice-and-comment rulemaking 10
B. The courts of appeals are divided on the question presented 16
C. Review is warranted to resolve an important and recurring question of administrative law 19
Conclusion 22
Appendix A — Court of appeals opinion (July 22, 2013) 1a
Appendix B — District court opinion (June 6, 2012) 13a
Appendix C — Administrator's Interpretation (Mar. 24, 2010) 49a
Appendix D — Opinion Letter (Sept. 8, 2006) 70a
Appendix E — Court of appeals order denying rehearing (Oct. 2, 2013) 85a
Appendix F — Statutory provisions 87a

TABLE OF AUTHORITIES

Cases:

Abraham Lincoln Mem'l Hosp. v. *Sebelius*, 698 F.3d 536 (7th Cir. 2012) 19
Alaska Prof'l Hunters Ass'n v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) 8, 11, 19
Brooklyn Sav. Bank v. *O'Neil*, 324 U.S. 697 (1945) 3
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 13, 15

Cases—Continued: Page

Environmental Integrity Project v. *EPA*, 425 F.3d 992 (D.C. Cir. 2005) 15
Erringer v. *Thompson*, 371 F.3d 625 (9th Cir. 2004) 18
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 11, 12
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 14
Hoctor v. *United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996) 14
Leavitt v. *Baystate Health Sys.*, 547 U.S. 1054 (2006) 20
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 12
Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 12
MetWest Inc. v. *Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009) 7
Miller v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008) 17, 18
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 15
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 13
Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998) 6, 10
SBC Inc. v. *FCC*, 414 F.3d 486 (3d Cir. 2005) 17
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 12, 15, 20, 21
Shell Offshore Inc. v. *Babbitt*, 238 F.3d 622 (5th Cir. 2001) 17
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 14

Cases—Continued: Page

Tripoli Rocketry Ass'n v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1 (D.D.C. 2004) 6
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 11, 16, 19
Warder v. *Shalala*, 149 F.3d 73 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999) 18
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950) 16
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) 18

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 2, 8, 9, 10, 11, 21
5 U.S.C. 551-559 ..... 3, 11
5 U.S.C. 551(4) 2, 12, 15
5 U.S.C. 551(5) 2, 10, 12
5 U.S.C. 551(6) 16
5 U.S.C. 551(7) 16
5 U.S.C. 553 ..... 2, 16, 19
5 U.S.C. 553(b) 3, 11
5 U.S.C. 553(b)(A) 3, 6, 10, 11
5 U.S.C. 553(c) 3, 11
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 3
29 U.S.C. 206 3
29 U.S.C. 207 3
29 U.S.C. 213(a)(1) 3, 11
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* 3, 7
29 U.S.C. 259(a) 3, 4
29 U.S.C. 259(b)(1) 4
28 U.S.C. 1391(e)(1) 20

Statute and regulations—Continued: Page

28 U.S.C. 2343 20

29 C.F.R.:

Pt. 541 (1998) 4

Pt. 541 4

Section 541.203(b) 4, 7

Section 541.500(b) 5

Miscellaneous:

3 Fed. Reg. 2518 (Oct. 20, 1938) 4

Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 13

Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917 (2006) 16

Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000) 13, 21

Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345 (1978) 16

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 13, 15

U.S. Gov't Accountability Office, GAO-09-205, *Federal Rulemaking* (2009) 21

Wage & Hour Div., U.S. Dep't of Labor:

Opinion Letter (May 17, 1999), 1999 WL 1002401 4

Opinion Letter (Feb. 16, 2001), 2001 WL 1558764 4

14D Charles Alan Wright et al., *Federal Practice and Procedure* (4th ed. 2013) 20

In the Supreme Court of the United States

No.

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor and the other federal petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 720 F.3d 966. The opinion of the district court (App., *infra*, 13a-48a) is reported at 864 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 2, 2013 (App., *infra*, 85a-86a). On December 19, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including January 30, 2014. On January 21, 2014, the Chief Justice further extended the time to February 28, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition. App., *infra*, 87a-99a.

STATEMENT

1. a. This case concerns whether the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, requires a federal agency to follow notice-and-comment rulemaking procedures before it may alter an "interpretive" rule that articulates an interpretation of an agency regulation.

The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). The Act further defines "rule" to encompass a broad range of agency "statement[s]" serving various functions, including statements that are "designed to * * * interpret * * * law" as well as statements that are designed "to implement * * * or prescribe law." 5 U.S.C. 551(4). More specifically, the Act defines "rule" to "mean[] the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Ibid.*

Section 4 of the APA, 5 U.S.C. 553, governs the process of agency rulemaking. Section 4(a) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof."

5 U.S.C. 553(b). Section 4(b) further provides that, if "notice [is] required by this section," the agency, after giving such notice, "shall give interested persons an opportunity to participate in the rule making through submission of written [comments]" and consider those comments before promulgating the rule. 5 U.S.C. 553(c).

Section 4, however, provides that the APA's notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

b. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its minimum-wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [5 U.S.C. 551-559])." 29 U.S.C. 213(a)(1).

Congress contemplated that, in the course of its administration of the FLSA, the Department of Labor (Department) would from time to time modify or rescind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or over-

time compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1).

The Department has promulgated regulations using notice-and-comment rulemaking that define and delimit the categories of FLSA-exempt employees. See, *e.g.*, 29 C.F.R. Pt. 541 (1998); 3 Fed. Reg. 2518 (Oct. 20, 1938) (original Part 541 regulations). In 2004, the Department revised those regulations using notice-and-comment rulemaking. 29 C.F.R. Pt. 541. The current regulations provide, in pertinent part, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. 541.203(b).

2. This case involves the Department's interpretation of its FLSA regulations in the context of mortgage-loan officers. In 1999 and 2001, the Wage and Hour Division issued Opinion Letters in which it interpreted the then-existing regulations and concluded that mortgage-loan officers are not FLSA-exempt employees, *i.e.*, the FLSA's minimum-wage and overtime requirements apply to those employees.[1]

After the Department revised its FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA or Association), a national trade association

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[1] See Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter (Feb. 16, 2001), available at 2001 WL 1558764; Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter (May 17, 1999), available at 1999 WL 1002401.

representing real-estate-finance companies, requested an opinion from the Wage and Hour Division on whether mortgage-loan officers are FLSA exempt. App., *infra*, 3a, 20a n.3. In 2006, the Division's Administrator issued a letter opining that mortgage-loan officers are exempt administrative employees under those regulations. *Id.* at 70a-84a.

In 2010, the Wage and Hour Division revisited the issue and revised its interpretation of the governing regulations in an Administrator's Interpretation. App., *infra*, 49a-69a. That Interpretation reanalyzed provisions of the 2004 regulations and considered judicial decisions addressing the administrative exemption. *Id.* at 50a-69a. The Department concluded that "employees who perform the typical job duties of a mortgage loan officer, as described" in the Interpretation, "have a primary duty of making sales for their employers and, therefore, do not qualify" for the exemption for "administrative" employees under the FLSA's implementing regulations. App., *infra*, 49a-50a, 52a, 69a. At the same time, the Department withdrew its 2006 Opinion Letter, explaining that the Letter had been based on an erroneous reading of a regulation addressing work performed incidental to, and in conjunction with, an employee's own sales or solicitations (29 C.F.R. 541.500(b)). App., *infra*, 59a & n.3. The Department did not utilize notice-and-comment rulemaking to issue its 1999, 2001, and 2006 Opinion Letters or its 2010 Administrator's Interpretation.

3. a. Respondent MBA filed this APA action in district court to vacate and set aside the 2010 Administrator's Interpretation. App., *infra*, 13a-14a, 28a. Respondents Buck, Henry, and Nickols (former mort-

gage-loan officers) intervened. 2/13/2012 Order 1-2 (Doc. 25).

MBA argued that the 2010 Administrator's Interpretation was invalid on two grounds. First, the Association argued that the interpretation was procedurally invalid because APA notice-and-comment rulemaking was required for the agency to be able to express its revised reading of its regulation in an interpretive rule. App., *infra*, 28a. Second, the Association argued that the interpretation is substantively invalid because it is inconsistent with the regulations it interprets and, thus, was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Ibid.* (citation omitted).

The government argued that, as relevant here, the Administrator's Interpretation was an "interpretive" rule and that the APA exempts such "interpretive rules" from notice-and-comment rulemaking. Gov't Cross Mot. to Dismiss 14-15 (Doc. 15) (citing 5 U.S.C. 553(b)(A)); see *id.* at 15 n.8 ("There is no dispute between the parties that the 2010 [Administrator's Interpetation] is an interpretive rule."). MBA acknowledged that the government was "correct" that the 2010 Administrator's Interpretation was an interpretative rule, but argued that its status as an interpretative rule is "of no moment" because an "'interpretative rule[] * * * still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans* [*of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998),] and its progeny." MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17) (quoting *Tripoli Rocketry Ass'n* v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 12 (D.D.C. 2004)).

b. The district court granted summary judgment to the government. App., *infra*, 13a-48a.

First, the district court concluded that the Department did not have to use notice-and-comment rulemaking to revise its prior interpretation of its regulations. App., *infra*, 32a-44a. The district court explained that the D.C. Circuit's *Paralyzed Veterans* precedents controlled, *id.* at 32a-37a, but concluded that they would require notice-and-comment rulemaking only if the affected party had "substantial[ly] and justifiabl[y] reli[ed] on a [prior] well-established agency interpretation," *id.* at 40a (quoting *MetWest Inc.* v. *Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009) (emphasis omitted)). See *id.* at 37a-41a. The court found that the Association had failed to establish such reliance. *Id.* at 41a-44a. The court stated, *inter alia*, that the Portal-to-Portal Act's defense for good-faith reliance on a prior agency interpretation undermined the Association's argument that notice-and-comment rulemaking was required to protect the reliance interests of its members. *Id.* at 43a-44a.

Second, the district court upheld the Administrator's Interpretation on its merits. App., *infra*, 44a-47a. The court concluded that the agency's interpretation of its FLSA regulations was "persuasive," finding it "clear" on the face of the regulations that the Association's contrary position was based on a misreading of 29 C.F.R. 541.203(b). App., *infra*, 44a, 46a. The court accordingly held that the 2010 interpretation was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 47a.

4. a. On appeal, MBA argued only that the 2010 Administrator's Interpretation was procedurally inva-

lid under *Paralyzed Veterans*. See MBA C.A. Br. 2, 20-21. The Association abandoned its contention that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. See *id.* at 1-56; MBA C.A. Reply Br. 1-29.

b. The D.C. Circuit reversed and remanded with instructions to vacate the 2010 Administrator's Interpretation. App., *infra*, 1a-12a.

The court of appeals explained that, under its *Paralyzed Veterans* cases, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." App., *infra*, 2a (quoting *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)) (brackets in original). That conclusion, the court explained, rests on the "operative assumption" that "a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Id.* at 5a n.3.

The court of appeals further concluded that the relevant analysis under *Paralyzed Veterans* "contains just two elements: definitive interpretations ('definitiveness') and a significant change ('significant revision')." App., *infra*, at 5a. The court of appeals thus rejected the government's argument that the rule of *Paralyzed Veterans* incorporates an element of reliance. *Id.* at 6a-12a. The court held that although reliance can in some contexts be relevant to whether a prior agency interpretation was sufficiently definitive, reliance is not itself a distinct requirement under *Paralyzed Veterans*. *Id.* at 9a.

The court of appeals observed that the government "conceded the existence of two definitive—and conflicting—agency interpretations." App., *infra*, 3a. The court accordingly held that, under its *Paralyzed Veterans* jurisprudence, the 2010 Administrator Interpretation, which significantly revised the agency's 2006 Opinion Letter, must be vacated. *Ibid.* The court emphasized that it took "no position on the merits of [the 2010] interpretation" and stated that the Department was entitled to "readopt" that interpretation in the future but must "conduct the required notice and comment rulemaking" before it does. *Ibid.*

Finally, the court of appeals recognized that "the Courts of Appeals are split on the issue" whether *Paralyzed Veterans* correctly requires notice-and-comment rulemaking to modify an interpretive rule. App., *infra*, 5a n.3. The court observed, however, that it was bound by its own precedent and "decline[d] the government's invitation to 'call' for 'the full Court [to] * * * lay the *Paralyzed Veterans* doctrine to rest.'" *Id.* at 2a n.1 (second brackets in original).

c. The court of appeals denied respondents Buck, Henry, and Nickols' petition for rehearing en banc. App., *infra*, 85a-86a.

REASONS FOR GRANTING THE PETITION

This case concerns an important and recurring question of administrative law: Whether a federal agency is required to conduct notice-and-comment rulemaking before it may correct or significantly revise its own interpretation of a substantive regulation. The D.C. Circuit's rule that such formal rulemaking is required is contrary to the unambiguous text of the Administrative Procedure Act and conflicts with this Court's teachings on the proper scope of

APA review. Moreover, the D.C. Circuit in this case eliminated the need for plaintiffs even to show reliance on the prior regulatory interpretation that an agency seeks to revise. An agency thus must now undertake notice-and-comment rulemaking simply to explain to the public that the agency has corrected or revised its previous legal interpretation of a regulation in some significant way—even if no one has ever relied on the prior interpretation.

As the D.C. Circuit acknowledged, the courts of appeals are divided over whether the APA ever requires an agency to use notice-and-comment rulemaking to alter its prior interpretation of a regulation. App., *infra*, 5a n.3. The adverse impact of the D.C. Circuit's doctrine from *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (1997), cert. denied, 523 U.S. 1003 (1998), is especially significant because nearly all federal agencies are subject to suit in the District of Columbia and because of the prominent role that the D.C. Circuit plays in federal administrative law as a result. This Court's review is warranted.

A. The Court Of Appeals Erred In Holding That An Interpretive Rule That Alters The Agency's Previous Interpretation Of A Substantive Regulation Must Be Promulgated Through Notice-And-Comment Rulemaking

This case is controlled by two fundamental rules of administrative law. First, the APA itself expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). Second, the APA "sets forth the full extent of judicial authority to review executive agency

action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 545-549 (1978)). The D.C. Circuit's *Paralyzed Veterans* doctrine, which requires agencies to engage in notice-and-comment rulemaking to revise an interpretive rule that construes a substantive agency regulation, cannot be squared with those principles.[2]

1. Section 4 of the APA generally directs that a "notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. 553(b). If such notice is required, the agency must also give interested persons "an opportunity to participate in the rule making through submission of written [comments]." 5 U.S.C. 553(c). Section 4, however, specifies that, unless "notice or hearing is required by statute," the APA's notice-and-comment rulemaking requirement "does *not* apply * * * to interpretative rules." 5 U.S.C. 553(b)(A) (emphasis added).[3]

The APA's definition of "rule making" demonstrates that this exemption from the notice-and-comment rulemaking requirement applies not only when an agency formulates an interpretive rule in the

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[2] Although *Paralyzed Veterans* articulated its notice-and-comment requirement in dictum, the D.C. Circuit later elevated that requirement to a holding in *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

[3] No other statute requires notice in this case. The FLSA vests the Secretary of Labor with authority to "define[] and delimit[]" the scope of the minimum-wage and overtime exemption in Section 213(a)(1) by issuing "regulations * * * subject to the provisions of subchapter II of chapter 5 of title 5," 29 U.S.C. 213(a)(1), *i.e.*, subject to the APA's administrative-procedure provisions at 5 U.S.C. 551-559.

first instance, but also when it issues a subsequent interpretive rule that revises or supersedes the first. Because the Act defines "rule making" to be an "agency process for formulating, *amending*, or *repealing* a rule," 5 U.S.C. 551(5) (emphasis added), the statutory provisions in Section 4 that govern "rule making"—and specifically the exemption for "interpretive rules"—necessarily apply to any agency process for "formulating, amending, or repealing" (*ibid.*) any "agency statement of general or particular applicability and future effect designed to * * * interpret * * * law," 5 U.S.C. 551(4) (defining "rule"). Likewise, the APA more generally "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515.

The statutory direction that all "interpretative rules" are exempt from notice-and-comment rulemaking (unless a statute requires otherwise) is unambiguous. This Court has thus repeatedly made clear that "[i]nterpretive rules do not require notice and comment." *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); see also, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply * * * only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

2. The reason for that principle is plain. An "interpretive rule" is a statement "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*

Mem'l Hosp., 514 U.S. at 99 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979)). Such statements "do not have the force and effect of law" (*ibid.*); they "merely [reflect] the agency's present belief concerning the meaning" of the statutes and legislative rules that do. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 27 (1941) (*Final Report*); see U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947) (*APA Manual*) (citing *Final Report* for definition of interpretive rules).[4] And because those statements reflect the agencies' *own* views, not binding legislative rules that would have the force of law, Congress presumably determined that it would be an unwarranted encroachment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's views on the meaning of relevant statutory and regulatory provisions. Cf. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 571 (2000) (Pierce) ("[S]ince an interpretative rule does not have the force of law, an agency does not have to issue a rule that has the force of law in order to amend a prior interpretative rule.").

That conclusion carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision is, in fact, erroneous. Agencies should be encouraged to announce their

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[4] This Court has repeatedly found the Attorney General's manual interpreting the APA to be persuasive. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases).

changed views promptly and publicly, rather than allow the public to be misled by an earlier agency interpretation. It is "no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Hoctor* v. *United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.).

The result produced under *Paralyzed Veterans* also runs counter to this Court's teachings. The Court has held that, where an agency has concluded that its prior "interpretation of its regulation" should be modified, "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 517 (1994) (quoting *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993)) (citation and brackets omitted). Yet that is what the *Paralyzed Veterans* doctrine does. By requiring an agency to undertake notice-and-comment rulemaking simply to change its prior interpretation of a substantive regulation, the court of appeals has effectively required the agency to promulgate a *new* substantive regulation using notice-and-comment rulemaking.

3. The "operative assumption" behind the D.C. Circuit's *Paralyzed Veterans* doctrine is "the belief that a definitive [agency] interpretation is so closely intertwined with the [substantive] regulation [being interpreted] that a significant change to the [interpretation] constitutes a repeal or amendment of the [regulation]." App., *infra*, 5a n.3; see also *id.* at 2a (the changed interpretation "in effect amend[s]" the underlying regulation). That assumption is incorrect.

When an agency issues an interpretive rule, it issues a "statement * * * designed to * * *

interpret * * * law," 5 U.S.C. 551(4) (emphasis added), not change or amend it. This Court has thus determined that an "interpretive rule" reflects "the agency's construction of the statutes and rules which it administers" and, unlike the substantive provisions being interpreted, "do[es] not have the force and effect of law." *Guernsey Mem'l Hosp.*, 514 U.S. at 99; see *Chrysler Corp.*, 441 U.S. at 302 n.31 ("substantive rules * * * 'have the force and effect of law'" but "'interpretive rules' * * * do not") (quoting *APA Manual* 30 n.3). Accordingly, as explained above (pp. 11-12, *supra*), the APA by its terms defines "rule making" to include the "amend[ment] or repeal[]" of an interpretive rule and specifically exempts such rulemaking from mandatory notice-and-comment procedures.

The conflict between the APA and the D.C. Circuit's *Paralyzed Veterans* doctrine is also reflected in the court's extension of that doctrine to agency adjudication. The D.C. Circuit has held that if an agency adopts an interpretation of one of its regulations in an agency adjudication (rather than in an interpretive rule), the agency cannot later alter that interpretation by interpretive rule without notice-and-comment rulemaking. See *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 994-995, 997-998 (2005) (holding that EPA orders in licensing proceedings were "definitive interpretation[s]" of substantive regulations that could not be modified by a later interpretive rule absent notice-and-comment rulemaking). Yet the agency would be able to modify the same interpretation in a subsequent adjudication to which the APA's rulemaking provisions do not apply. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292, 294 (1974) (finding it

"plain" that agency may "announc[e] new principles in an adjudicative proceeding"; rejecting view that "rulemaking was required because * * * [the agency's interpretation] would be contrary to its prior decisions"); see also 5 U.S.C. 551(6) and (7) (agency "adjudication" involves matters "other than rule making"). That anomalous result underscores the artificial and nonstatutory foundation of the *Paralyzed Veterans* doctrine.

4. Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking" proceedings. *Vermont Yankee*, 435 U.S. at 524. That provision "settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 40 (1950)); see Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359-370 (1978). The D.C. Circuit has thus disregarded a fundamental principle of administrative law by establishing notice-and-comment requirements for interpretive rules that Congress has expressly exempted. Cf. Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006) (explaining that "[a]cademic commentary on [the *Paralyzed Veterans* doctrine] has been scathing"; citing critiques).

B. The Courts Of Appeals Are Divided On The Question Presented

As the D.C. Circuit recognized, "the Courts of Appeals are split on the [*Paralyzed Veterans*] issue." App., *infra*, 5a n.3. The Fifth Circuit has joined the

D.C. Circuit in concluding that an agency must conduct notice-and-comment rulemaking to alter a prior interpretive rule construing an agency regulation. *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 629-630 (5th Cir. 2001).[5] The First and Ninth Circuits, however, have held that the APA permits agencies to modify their interpretive rules without notice and comment. That division of authority warrants this Court's review.

In *Miller* v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), cert. denied, 555 U.S. 1208 (2009), the Ninth Circuit addressed a challenge to the Department of Justice's interpretation of a regulation promulgated under the Americans with Disabilities Act. The district court in *Miller* held that the Department had "fundamental[ly] modifi[ed] its previous interpretation" of that regulation and, invoking *Paralyzed Veterans*' analysis, held that the interpretive change "had to be adopted through notice-and-comment rulemaking." *Id.* at 1027. The court of appeals reversed with two alternative holdings. The court first held that the first interpretation of the regulation was not attributable to the Department and that the Department's subsequent interpretation thus did not reflect a change. *Id.* at 1031-1032. But as relevant here, the court of appeals further held that, "even if the DOJ's interpretation constituted a change in [its] understanding of [the regulation]" and that change was "unanticipated," the Department was "not required to proceed by notice and comment." *Id.* at

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[5] The Third Circuit has cited the *Paralyzed Veterans* doctrine favorably in dictum. *SBC Inc.* v. *FCC*, 414 F.3d 486, 498, 501 (3d Cir. 2005) (concluding that agency "did not modify or substantively change [its] prior interpretation of the regulation").

1033. The court explained that "an agency can modify an interpretive rule without notice and comment," and the interpretations at issue were "interpretive rules." *Ibid.* (citing and following holding in *Erringer* v. *Thompson*, 371 F.3d 625, 630 (9th Cir. 2004)).

Miller conflicts with the D.C. Circuit's decision in this case. By reversing the district court's adoption of the *Paralyzed Veterans* doctrine and broadly holding that "an agency can modify an interpretive rule without notice and comment," 536 F.3d at 1033, the Ninth Circuit has placed itself squarely on the other side of the conflict. Cf. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.").

Similarly, the First Circuit in *Warder* v. *Shalala*, 149 F.3d 73, 75-79 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999), held that an agency was entitled to change its interpretation of Medicare regulations without notice-and-comment rulemaking. The agency's interpretive rule (HCFAR 96-1) was challenged on the ground that it "changed [the agency's] policy" governing Medicare reimbursement for a device. *Id.* at 81. The First Circuit rejected that contention "both [on] the law and the facts." *Ibid.* As relevant here, the court held that, even if the "later rule [was] inconsistent with * * * [an earlier] agency interpretation," notice-and-comment rulemaking was "[un]necessary" to promulgate that interpretive rule. *Id.* at 81 (brackets omitted); see *id.* at 79 ("The APA exempts 'interpretive rules' from its notice and comment procedures.").

In addition, the Seventh Circuit has stated that the *Paralyzed Veterans* doctrine "conflicts with the APA's

rulemaking provisions * * * and with [Seventh Circuit] precedent." *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012). The court explained that although the D.C. Circuit holds that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation * * * through the process of notice and comment rulemaking," *ibid.* (quoting *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1033-1034 (D.C. Cir. 1999)) (brackets in original), the APA "exempt[s] *all* interpretive rules from notice and comment." *Ibid.* (emphasis added).[6]

C. Review Is Warranted To Resolve An Important And Recurring Question Of Administrative Law

This case raises a fundamental and recurring question about the structure and meaning of the APA and the obligations that Congress elected to impose on administrative agencies. As noted above, this Court has recognized that the APA's rulemaking provision (5 U.S.C. 553) is "a formula upon which opposing social and political forces * * * c[a]me to rest." *Vermont Yankee*, 435 U.S. at 523. That provision—including its unqualified exemption for interpretive rules—thus specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies" for rulemaking. *Id.* at 524. Yet the D.C. Circuit has held, in its *Paralyzed*

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[6] The Seventh Circuit's *Paralyzed Veterans* discussion followed its conclusion that the challenged agency decision "did not constitute a departure from a previous position" but, "[e]ven if" it did, "the Decision properly qualifies as an adjudication" that did not require notice and comment. *Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 558. It is therefore not clear that the court's *Paralyzed Veterans* discussion was necessary to its decision.

Veterans doctrine, that an agency, before it can issue a statement to "advise the public of the agency's [current] construction of" its own regulations, *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (citation omitted), must first ask the public for its views using notice-and-comment rulemaking. And in this case, the D.C. Circuit has now further held that the doctrine requires notice-and-comment rulemaking even if no one has meaningfully relied on the interpretive rule that an agency seeks to modify.[7]

The adverse impact of that ruling is particularly significant because venue lies in the District of Columbia over APA actions against most federal agencies. See 28 U.S.C. 1391(e)(1); 14D Charles Alan Wright et al., *Federal Practice and Procedure* §§ 3815-3816, at 331-334, 344-348 (4th ed. 2013); see also, *e.g.*, 28 U.S.C. 2343. Because of that ever-present potential for challenge in the D.C. Circuit, that court's fundamentally misguided *Paralyzed Veterans* doctrine can present a formidable *in terrorem* barrier for agencies seeking to correct or revise their

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[7] The government previously argued that the *Paralyzed Veterans* doctrine was erroneous in a certiorari petition presenting a different question on which the Court denied a writ of certiorari. See Pet. at I, 24-25, *Leavitt* v. *Baystate Health Sys.*, 547 U.S. 1054 (2006) (No. 05-936). The government made that argument in *Baystate* because the court of appeals had rested its conclusion that the government ruling at issue in *Baystate* had implicitly conceded that a prior interpretive rule was invalid in part on the court's view that, if the prior rule had been valid, then the subsequent ruling in *Baystate* would have been invalid under *Paralyzed Veterans*. See *id.* at 5-6, 18-19, 24-25. *Baystate*, however, did not involve an actual application of the *Paralyzed Veterans* doctrine, and it thus did not present the question that is now presented for the Court's review. See *id.* at I (question presented).

interpretations of regulations. Many complex government programs are heavily dependent upon interpretive rules to inform the public about the agency's understanding of the details of the regulatory regime. The Medicare program, for instance, has "thousands of pages of interpretative rules that address myriad details that are not explicitly resolved by the legislative" regulations. Pierce, 52 Admin. L. Rev. at 553; see, *e.g.*, *Guernsey Mem'l Hosp.*, 514 U.S. at 97-99, 101-102. Under the provisions of the APA that Congress enacted, the agency should be free to revisit its intepretations expeditiously through new interpretive rules. Notice-and-comment rulemaking, by contrast, is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, 52 Admin. L. Rev. at 550-551; see U.S. Gov't Accountability Office, GAO-09-205, *Federal Rulemaking* 5, 19 (Apr. 2009) (case study finding average of over four years to complete notice-and-comment rulemaking and that some "rules that were not major took nearly as long or longer to be published").

Certiorari is warranted for this Court to review the D.C. Circuit's *Paralyzed Veterans* doctrine, resolve the circuit conflict on the issue, and restore the freedom and procedural framework that Congress incorporated in the APA for agencies to interpret the regulatory programs they have adopted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5246

MORTGAGE BANKERS ASSOCIATION, APPELLANT

v.

SETH D. HARRIS, SUED IN HIS OFFICIAL CAPACITY, ACTING SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00073)

Argued: Mar. 22, 2013
Decided: July 2, 2013

OPINION

Before: TATEL and BROWN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: The tandem of *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) and *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999) ("*Alaska Hunters*") announced an ostensibly straightforward rule: "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Alaska Hunters*, 177 F.3d at 1034. The only question properly before this three-judge panel is a narrow one: what is the role of reliance in this analysis?[1] Is it, as the government contends, a "separate and independent requirement," Oral Arg. 10:42-10:45, or is it just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive,[2] as Mortgage Bankers Association ("MBA") suggests? We find ourselves in general agreement with the industry association that there is no discrete reliance element. Reliance is just one part of the definitiveness calculus.

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[1] Bound as we are by *Paralyzed Veterans* and *Alaska Hunters*, we decline the government's invitation to "call" for "the full Court [to] * * * lay the *Paralyzed Veterans* doctrine to rest." Letter of Clarification, No. 12-5246 (D.C. Cir. Mar. 25, 2013) (quoting Appellee Br. 47).

[2] Our case law uses the terms "definitive" and "authoritative" interchangeably. *Compare Paralyzed Veterans*, 11 F.3d at 586 ("authoritative interpretation"), *with Alaska Hunters*, 177 F.3d at 1034 ("definitive interpretation").

Fortunately, this is as far as our inquiry need go. Having conceded the existence of two definitive—and conflicting—agency interpretations, the government acknowledged at oral argument that petitioner "prevail[s] if . . . the only reason [courts] look to reliance is to find out if there is a definitive interpretation." Oral Arg. 10:56-11:10. So stipulated, we reverse the District Court order dismissing MBA's Motion for Summary Judgment and remand the case with instructions to vacate the 2010 Administrator Interpretation significantly revising the agency's 2006 Opinion Letter. If the Department of Labor ("DOL") wishes to readopt the later-in-time interpretation, it is free to. We take no position on the merits of their interpretation. DOL must, however, conduct the required notice and comment rulemaking.

I

Petitioner MBA is a national trade association representing over 2,200 real estate finance companies with more than 280,000 employees nationwide. *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 197 (D.D.C. 2012). We focus here on the mortgage loan officers who typically assist prospective borrowers in identifying and then applying for various mortgage offerings. Though the recent financial crisis has thrust members of this profession into the forefront of the news, our concern here is more mundane: the method and manner of their pay.

Under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, an old law DOL must adapt to new circumstances, employers are generally required to pay

overtime wages to employees who work longer than 40 hours per week. *See* 29 U.S.C. § 207(a). The Act provides several exceptions to this rule. Those "employed in a bona fide executive, administrative, or professional capacity[,] . . . or in the capacity of outside salesman," for example, are exempt from the statute's minimum wage and maximum hour requirements. 29 U.S.C. § 213(a)(1). Whether mortgage loan officers qualify for this "administrative exemption" is a difficult and at times contentious question. So difficult, in fact, DOL has found itself on both sides of the debate. In 2006, the agency issued an opinion letter concluding on the facts presented that mortgage loan officers with archetypal job duties fell within the administrative exemption. Just four years later, in 2010, Deputy Administrator Nancy J. Leppink issued an "Administrator's Interpretation" declaring that "employees who perform the typical job duties" of the hypothetical mortgage loan officer "do not qualify as bona fide administrative employees." J.A. 259. The 2010 pronouncement "explicitly withdrew the 2006 Opinion Letter." *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 201.

Citing *Paralyzed Veterans* and its progeny, MBA challenged DOL's decision to change their "definitive interpretation" without first undergoing notice-and-comment rulemaking as a violation of the APA. Compl. ¶ 38. [J.A. 22] The District Court rejectted the argument. After assuring itself that *Paralyzed Veterans* remains good law, *see Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 204-05, the court read our recent decision in *MetWest Inc. v. Secretary of*

Labor, 560 F.3d 506 (D.C. Cir. 2009), to require a showing of "substantial and justifiable reliance on a well-established agency interpretation." *See id.* at 207 (internal quotation marks and emphasis omitted). Although petitioner had argued reliance in the alternative, the court concluded MBA was unable to "satisfy the standard for demonstrating reliance recognized in *MetWest*." *Id.* at 208. The court then denied MBA's Motion for Summary Judgment, but not before dismissing the association's substantive challenge to the 2010 interpretation as inconsistent with the agency's 2004 regulation, 29 C.F.R. § 541.203(b). The present appeal followed.

II

On its face, the *Paralyzed Veterans* analysis contains just two elements: definitive interpretations ("definitiveness") and a significant change ("significant revision").[3] But as with most things doctrinal, the devil is in the details.

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[3] The doctrine's operative assumption—the belief that a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter—is established law in this Circuit, *see, e.g.*, *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997-98 (D.C. Cir. 2005), but the Courts of Appeals are split on the issue. According to one recent survey, the Fifth Circuit has adopted our approach and "the Eighth and Third Circuits have mentioned [it] in dicta," but "[t]he First, Second, Fourth, Sixth, Seventh, and Ninth Circuits agree that changes in interpretations do not require notice and comment because both the original and current position constitute interpretive rules." *Warshauer v. Solis*, 577 F.3d 1330,

Despite its age, few cases discuss *Paralyzed Veterans* at length.[4] One critical question—and a dispositive one here—concerns the role of reliance. Borrowing heavily from *MetWest* and *Honeywell International, Inc. v. NRC*, 628 F.3d 568 (D.C. Cir. 2010), two recent cases that draw on our *Alaska Hunters* decision, DOL suggests that the *Paralyzed Veterans* analysis contains an independent third element: substantial and justified reliance. MBA takes a different approach to *Alaska Hunters* altogether. In its view, that case stands only for the proposition that reliance can elevate an otherwise non-definitive interpretation into a definitive interpretation; as such, it falls squarely within the existing definitiveness element. Of the two, we believe MBA's approach better explains *Alaska Hunters*.

1338 (11th Cir. 2009); *see also United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1138-39 (10th Cir. 2010) (noting a slightly different circuit split between the Third, Fifth, and Sixth Circuits on one hand, and the First and Ninth Circuit on the other).

[4] It need not reflect poorly on the doctrine that so few of our cases haven taken up *Paralyzed Veteran's* banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking. *See* Appellee Br. 40-41 (counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions). *Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance. We are unable to quantify these effects by reference to case citations alone.

Alaska Hunters is an exceptional case with an otherwise straightforward premise. In 1963, the Federal Aviation Administration's Alaska office (the "Alaskan Region") began a thirty year practice of "uniformly advis[ing] all guides, lodge managers and guiding services in Alaska that they could meet their regulatory responsibilities by complying with the requirements of [14 C.F.R. Part 91] only." *Alaska Hunters*, 177 F.3d at 1035. It was not until 1997 that officials in FAA's Washington, D.C. headquarters formally pushed back against the regional office's long-standing interpretation.[5] Through a "Notice to Operators" published in the Federal Register without notice and opportunity for comment, the agency announced that certain Alaskan guides would now have to comply with other, more onerous regulations. Individuals who had "opened lodges and built up businesses dependent on aircraft" in reliance on the Alaskan Region's interpretation promptly brought suit challenging the agency's about-face. *Id.* at 1035.

In relevant part, FAA argued *Paralyzed Veterans* was "inapposite" because the Alaskan Region's interpretation was not definitive; it "represented

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[5] It is "uncertain" whether the D.C.-based officials had knowledge of the Alaskan Region's interpretive position prior to the 1990s—that is, before FAA consolidated power in its national headquarters following a near three-decade-long experiment with a decentralized organizational structure "that transferred much authority to regional organizations." *Alaska Hunters*, 177 F.3d at 1032.

simply a local enforcement omission, in conflict with the agency's policy in the rest of the country." *Id.* at 1034-35. We disagreed. Although a local office's interpretation of a regulation or provision of advice to a regulated party "will not necessarily constitute an authoritative administrative position, particularly if the interpretation or advice contradicts the view of the agency as a whole," the situation in *Alaska Hunters* was "quite different." *Id.* at 1035.

For one thing, there was no evidence in the record of any conflicting interpretation. The Alaskan Region uniformly enforced its interpretive position for thirty years and both FAA and the National Transportation Safety Board had at some point referred to it as FAA policy. *See id.* at 1035. And even if "FAA as a whole somehow had in mind an interpretation different from that of its Alaskan Region, guides and lodge operators in Alaska had no reason to know this." *Id.* All the regulated parties had before them was the formal,[6] uncontradicted, and uniformly-applied interpretation of a local office —an interpretation Alaskan guide pilots reasonably relied on for three decades. Such advice might not necessarily qualify as definitive, but here, we concluded, it "became an authoritative departmental

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[6] "[T]he regional office's position was reflected in official agency adjudications holding that Alaskan guides need not comply with commercial pilot standards." *Ass'n of Am. R.R. v. DOT*, 198 F.3d 944, 949 (D.C. Cir. 1999).

interpretation, an administrative common law applicable to Alaskan guide pilots" that could not be rewritten without notice and comment rulemaking. *Id.*

Alaska Hunters's takeaway is clear: reliance is but one factor courts must consider in assessing whether an agency interpretation qualifies as definitive or authoritative. Or to put matters more precisely, because regulated entities are unlikely to substantially—and often cannot be said to justifiably—rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation, significant reliance functions as a rough proxy for definitiveness. The converse also holds true. Agency pronouncements effectively ignored by regulated entities are unlikely to bear the marks of an authoritative decision. *See Ass'n of Am. R.R.*, 198 F.3d at 949-50 (finding no definitive interpretation in part because "[n]othing in th[e] record suggests that railroads relied on the [agency statements] in any comparable way" to the Alaska guides).[7] This is more art than science. Courts must weigh the role reliance plays on a case-by-case basis to ascertain its value.

DOL pushes back against this framework by treating reliance as a separate and independent

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[7] Obviously, this is not to suggest *any* measure of reliance will automatically render an interpretation definitive.

third element.[8] That, the agency claims, is exactly what our *MetWest* decision did in (1) addressing reliance only in the alternative, *i.e.*, after assuming a definitive interpretation, *see MetWest*, 560 F.3d at 510-11, and (2) speaking of *Alaska Hunters*'s "substantial and justifiable reliance on a well-established agency interpretation," *id.* at 511, a phrase "most natural[ly] read[]" to distinguish definitiveness and reliance as "separate requirements," Appellee Br.

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[8] The agency never develops the implications of its alternative vision, but we think two points obvious. First, by dissociating reliance from definitiveness and calling it an independent requirement, DOL believes courts will have to address the reliance issue in *all* cases, including cases like the present in which definitiveness has been established. Second, DOL assumes the third element would be satisfied only if the reliance is equal to or greater than that of *Alaska Hunters*, a unique case. Meaning, the *Paralyzed Veterans* doctrine would only ever apply where the parties can demonstrate substantial and justified reliance *akin to that of the Alaska Guides* —a reliance interest the government describes as "especially strong" since affected parties uprooted their lives to move to Alaska to start businesses. Appellee Br. 19; *see also MetWest*, 628 F.3d at 511; *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 207 ("[T]his Court is convinced that *MetWest* intended to set the bar for what a plaintiff must establish to satisfy the reliance component of the *Paralyzed Veterans* doctrine."). If adopted, this position effectively renders *Paralyzed Veterans* dead letter law by limiting its application to a most extreme fact pattern—one unlikely to ever be duplicated.

23-24; *see also Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 205-08.[9]

We do not think this characterization of *MetWest*'s dicta could possibly be correct. "Definitive" is a term of art as used in the *Paralyzed Veterans* context. Once a court has classified an agency interpretation as such, it cannot be significantly revised without notice and comment rulemaking. No intervening decision of this Court ever read *Alaska Hunters* to require anything to the contrary, and that includes *Association of American Railroads*, the lone pre-*MetWest* case DOL cites as having treated "reliance and definitive interpretation as two independent requirements." Appellee Br. 24.[10] Whether reliance played a significant role in the analysis, *see, e.g.*, *Alaska Hunters*, 177 F.3d at 1035-36; *Ass'n of Am. R.R.*, 198 F.3d at 950; or took a back seat where the definitive nature of the interpretation was treated as self-evident, *see Envtl. Integrity Project*, 425 F.3d at 998; *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 814 (D.C. Cir. 2001), we

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[9] Because *Honeywell* unceremoniously adopts *MetWest*'s language and approach, *see Honeywell*, 568 F.3d at 579-80, we focus our discussion primarily on *MetWest*.

[10] *See Ass'n of Am. R.R.*, 198 F.3d at 948 ("We find nothing in these materials, individually or taken together, that comes even close to the definitive interpretation that triggered notice and comment rulemaking in *Alaska Professional Hunters*."); *see also Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1041 (D.C. Cir. 2008); *Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49, 56-58 (D.C. Cir. 2002); *Envtl. Integrity Project*, 425 F.3d at 997-98.

have always considered it as part of the first element. In short, we have been too consistent in our treatment of these so-called agency flip-flops to now read dictum in *MetWest* as *sub silentio* reconfiguring the doctrine in the absence of either a unanimous *Irons* footnote or a decision of the en banc court.

Finally, we disagree with the suggestion that the only way to protect agencies from inadvertently locking in disfavored, informally promulgated positions is to impose a separate and independent reliance element. Practically speaking, reliance considered as part of the definitiveness determination will more than adequately protect agencies from this ossification threat. We thus decline DOL's invitation to spin a third requirement from whole cloth. Emphatically, that is an issue for the full Court to take up at its discretion, not this three-judge panel.

III

In view of the government's concession that the case need go no further than this, we reverse the District Court order denying MBA's Motion for Summary Judgment and remand the case with instructions to vacate DOL's 2010 Administrator Interpretation.

So Ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 11-0073 (RBW)

MORTGAGE BANKERS ASSOCIATION, PLAINTIFF

v.

HILDA SOLIS, SECRETARY OF LABOR; NANCY LEPPINK, ACTING WAGE AND HOUR ADMINISTRATOR; AND THE UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS

[June 6, 2012]

MEMORANDUM OPINION

The plaintiff, the Mortgage Bankers Association ("Association"), seeks declaratory and injunctive relief in this civil lawsuit brought against the defendants, Hilda Solis, in her official capacity as Secretary of the United States Department of Labor ("DOL"), Nancy Leppink, in her official capacity as Deputy Administrator of the Wage and Hour Division of the DOL, and the DOL itself, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006). Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 1. Specifically, the plaintiff seeks judicial review of the

defendants' issuance of DOL Administrative Interpretation 2010-1 ("2010 AI"), which conflicts with a prior position taken by the DOL. *Id.* ¶¶ 2, 26-27. Currently before the Court is the Association's Motion for Summary Judgment and the DOL's Cross Motion to Dismiss or, in the Alternative, for Summary Judgment. Upon consideration of the complaint, the parties' cross-motions, all memoranda of law and the exhibits submitted with the motions, and the administrative record,[1] the Court concludes that it must grant in part and deny in part the DOL's cross-motion and deny the Association's motion for summary judgment.

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[1] In addition to the documents already identified, the Court considered the following submissions in reaching its decision: (1) the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Mem."), (2) the Defendants' Cross-Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mot."), (3) the Plaintiff's Reply in Support of its Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment ("Pl.'s Reply"), and (4) the Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Reply").

I. BACKGROUND

A. Statutory and Regulatory Framework

This case concerns the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 201-219 (2006), and the regulations promulgated by the DOL to implement the Act. *See* Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mot.") at 1. Enacted by Congress in 1938, Compl. ¶ 14, the FLSA generally requires that covered employers pay overtime wages to their employees who work more than 40 hours per week, unless they are exempted by the Act from this requirement. 29 U.S.C. § 207(a)(1). Section 213(a)(1) of the FLSA provides for such an exemption, stating that "any employee employed in a bona fide executive, administrative, or professional capacity[,] . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary[,] . . .)" is exempt from the "[m]inimum wage and maximum hour requirements" otherwise required by the Act. 29 U.S.C. § 213(a)(1).

The Wage and Hour Division of the DOL ("Wage and Hour Division") is responsible for "administering and enforcing the FLSA, and it periodically issues regulations that define the scope of the FLSA's exemptions and interpretations of those regulations." Defs.' Mot. at 4. After the passage of the FLSA, the Wage and Hour Division "promulgated regulations defining and delimiting the FLSA's exemptions from overtime pay requirements." Compl. ¶ 14. Those regulations were most recently amended on August 23, 2004. *See*

Administrative Record ("A.R.") at 8-78 (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122-191 (Apr. 23, 2004) (codified at 29 C.F.R. § 541)). As revised, the regulations state that the administrative exemption of section 213(a)(1) of the FLSA applies to an employee:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . ;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). The 2004 regulations were accompanied by a preamble "Summary," which explained that the administrative "exemption is intended to be limited to those employees whose duties relate to the administrative as distinguished from the production operations of a business." 69 Fed. Reg. 22122, 22141 (internal quotation marks omitted). The 2004 regulations also provide examples that illustrate how the administrative duties exemption can be applied to employees in various occupations, including the following example regarding the financial services industry:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work

> such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b) (entitled "Administrative exemption examples").

B. Factual and Procedural Background

1. *Pre-2004 Interpretation of the Administrative Exemption*

The following facts are not in dispute and are taken from either the Association's complaint or the administrative record filed in this case.

The plaintiff is a national trade association that represents the real estate finance industry. Compl. ¶ 7. The Association "has over 2,200 member companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field." *Id.* These companies employ over 280,000 individuals throughout the United States. *Id.* The Association's primary goals are "to ensure the continued strength of the nation's residential and commercial real estate market, to expand home

ownership and extend access to affordable housing to all Americans." *Id.*

From as early as 1964, and until March 24, 2010, the DOL announced its interpretation of the FLSA through the issuance of "[o]pinion [l]etters." *Id.* ¶ 15. These opinion letters were written in response to inquiries from private parties seeking guidance about the application of the FLSA to their business activities. *Id.* Access to the opinion letters was available through several avenues, including, in recent years, electronic legal research databases and the DOL's own website. *See id.* And as the plaintiff correctly points out, the District of Columbia Circuit has held that "DOL Opinion Letters . . . constitute final agency action subject to judicial review." *Id.* ¶ 16 (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701-02 (D.C. Cir. 1971) (holding that although the opinion letters lack formality, they are intended as a "deliberative determination of the agency's position" and thus are subject to judicial review)).

The administrative record in this case contains two opinion letters issued by the DOL prior to the 2004 amendment of its regulations. The first, dated July 23, 1997, discussed whether a wholesale salesman is exempt from the FLSA's overtime requirements. A.R. at 1-3 (Opinion Letter, 1997 WL 970727 (DOL WAGE-HOUR)). This opinion letter concluded that "[t]he decisions of wholesale salesmen typically do not involve matters of policy or significant importance, but are limited to routine day-to-day operational matters." *Id.* at 2-3. While the Wage and Hour Division did not come to an ultimate conclusion on the exemption ques-

tion, the opinion letter suggested that wholesale salesmen are not covered by the administrative exemption.[2] *Id.* The second pre-2004 opinion letter found in the administrative record, dated May 17, 1999, determined that "loan officers are engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business" and were therefore non-exempt employees entitled to overtime. *See id.* at 5 (Opinion Letter, 1999 WL 1002401 (DOL WAGE-HOUR) ("1999 Opinion Letter")).

Effective August 23, 2004, the DOL amended its regulations interpreting the wage and hour requirements set forth by the FLSA. Compl. ¶ 21. As noted earlier, the amended regulations, as they pertain to the financial service industry, provide:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best

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[2] If the party does not provide the DOL with sufficient facts regarding the nature of their inquiry, the DOL will not provide an ultimate conclusion; rather, it will state what set of facts would need to exist in order for the employee to be exempt. *See generally* Defs.' Mot. at 11-12 (citing A.R. at 87-93 (Opinion Letter FLSA2006-31 ("2006 Opinion Letter"))) (providing an opinion that an employee would be exempt if the assumptions provided by the requestor and other relevant facts are true).

> meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

Id. (citing 29 C.F.R. § 541.203(b)). And as already noted, the amended regulations included a preamble, *id.* ¶ 22, which makes it clear that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." 69 Fed. Reg. at 22146.

2. *The 2006 Opinion Letter*

On September 8, 2006, the DOL issued an opinion letter to the Association ("2006 Opinion Letter"), *see* A.R. at 87-93 (Opinion Letter FLSA2006-31 ("2006 Opinion Letter")), at the Association's request. Defs.' Mot. at 11 n.6.[3] In requesting the letter, the Association asked the DOL to assume that the mortgage loan officers who were the subject of the letter spent less than fifty percent of their working time on "customer-specific persuasive sales activity." *Id.* at 11-12 (internal quotation marks and citation omitted). The

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[3] Generally, the DOL does not release the name of the requestor for an opinion letter. Defs.' Mot.. at 11 n.6. However, the Association has acknowledged that it requested the 2006 opinion letter. *Id.*

2006 Opinion Letter began by reminding the Association that an employee's exempt status is "determined by analyzing each particular employee's actual job duties and compensation under the applicable regulations." A.R. at 87 (2006 Opinion Letter).

The Association also asked whether the DOL's analysis of the administrative exemption was altered by the 2004 regulations. *Id.* at 88-89. In response, the DOL noted that "[b]ecause the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, the outcome of this opinion would be essentially identical under either version of the regulations." *Id.* at 89 (citation omitted).

The 2006 Opinion Letter reinforced that the 2004 revised regulations made the administrative exception applicable to employees when their employment satisfied the following three components:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Id. (citation omitted). With regard to the second prong of this test, the letter defined "[w]ork that is

'directly related to the management or general business operations' of the employer . . . as 'work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.'" *Id.* (citation omitted). As to the third component of the test, the term "primary duty" is defined in the letter as "the principal, main, major or most important duty that the employee performs." *Id.* (quoting 29 C.F.R. § 541.700(a)). The letter explained that the amount of time an employee spends performing exempt work is a factor to consider in assessing the applicability of the exemption, but time alone "is not the sole test." *Id.* (quoting 29 C.F.R. § 541.700(b)).

The 2006 Opinion Letter further noted that although employees whose primary duty involves sales cannot qualify for the administrative exemption, many financial services employees could and had been found to fall under this exemption. *Id.* at 90 (citing 29 C.F.R. § 541.700(b)). Accordingly, the DOL concluded that the loan officers who were the subject of the 2006 Opinion Letter

> ha[d] a primary duty other than sales, as their work include[d] collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Id. at 90-91. The letter concluded that "the use of software programs or tools to assess risk and to narrow the scope of products available to the customer does not necessarily disqualify the employees from the administrative exemption for lack of discretion and independent judgment." *Id.* at 91. Finally, the letter noted that its "opinion [was] based exclusively on the facts and circumstances described in [the Association's] request and is given based on [the Association's] represenation, express or implied, that [the Association] ha[d] provided a full and fair description of all the facts and circumstances that would be pertinent to [the DOL's] consideration of the question presented." *Id.* at 93.

According to the Association, relying on the 2006 Opinion Letter, many members of the financial services industry, including many of the Association's members, classified mortgage loan officers as exempt employees. Compl. ¶ 24. Thus, mortgage loan officers were not compensated with overtime pay. *Id.* ¶ 25. Rather, the members of the Association ensured that their mortgage loan officers were well compensated through other means, like competitive salaries, bonuses, and commissions. *Id.*

3. *The 2010 Administrative Interpretation*

On March 24, 2010, the DOL, "*sua sponte*," issued an Administrative Interpretation, the 2010 AI, expressly withdrawing the 2006 Opinion Letter. *Id.* ¶ 26. Nancy Leppink, Acting Administrator of the Wage and Hour Division, issued the 2010 AI. *See* A.R. at 102 (U.S. Department of Labor, Administrator's Interpre-

tation No. 2010-01 ("Administrator's Interpretation No. 2010-01")). The 2010 AI focuses on "[w]hether the primary duty of employees who perform the typical job duties of a mortgage loan officer is office or non-manual work directly related to the management or general business operations of their employer or their employer's customers." *Id.* at 103. The 2010 AI expressed that to qualify for the exemption, an employee's "[w]ork [must be] directly related to management or general business operations of an employer[, which] includes work in functional areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations, and similar areas." *Id.* (citation omitted). In essence, the 2010 AI states that the administrative exemption was designed for "employees whose work involves servicing the business itself[.]" *Id.* at 104.

The 2010 AI relies on a District of Minnesota decision, *Casas v. Conseco Finance Corp.*, No. Civ. 00-1512, 2002 WL 507059 (D. Minn. March 31, 2002) in addition to several other cases, as support for its position that mortgage loan officers are non-exempt employees. *Id.* at 105. In *Casas*, loan originators asserted they were entitled to overtime compensation from the defendants under the FLSA, requiring the court to decide whether the plaintiffs were exempt from FLSA overtime pay provisions. The court found that because "Conseco's primary business purpose [was] to design, create and sell home lending products," the mortgage loan officers' primary duty was to sell those lending products on a day-to-day basis, not "'the running of [the] business [itself]' or determining its overall course or policies."

Casas, 2002 WL 507059, at *9 (citation omitted) (alterations in original). Relying on the ruling in Casas, the 2010 AI reasons that "because Conseco's loan officers' duties were 'selling loans directly to individual customers, one loan at a time,'" the administrative exemption did not apply to them. A.R. at 105 (Administrator's Interpretation No. 2010-01) (internal citation omitted). The 2010 AI further notes that the 2004 amended regulations examined the difference between mortgage loan officers who spend the majority of their time selling mortgage products to consumers, like the *Casas* plaintiffs, as compared to those who "promot[e] the employer's financial products generally, decid[e] on an advertising budget and techniques, run[] an office, hir[e] staff and set[] their pay, service[] existing customers . . . , and advis[e] customers." *Id.* at 105 (citing 69 Fed. Reg. at 22145-46). The 2010 AI concluded that in order for mortgage loan officers to be properly classified as exempt employees, their primary duties must be administrative in nature. *Id.* at 105.

Relying on the facts that a significant portion of mortgage loan officers' compensation is composed of commissions from sales, that their job performance is evaluated based on their sales volume, and that much of the non-sales work performed by the officers is completed in furtherance of their sales duties, the 2010 AI concluded "that a mortgage loan officer's primary duty is making sales." *Id.* at 106-07. And because their primary duty is making sales, the 2010 AI further concludes that "mortgage loan officers perform the production[, not the administrative,] work of their employers." *Id.* at 107.

After concluding that the work of mortgage loan officers is not related to the general business operation of their employers, the 2010 AI considered another factor that could provide the basis for finding that mortgage loan officers are subject to the administrative exemption. *Id.* at 108. The AI states that "[t]he administrative exemption can also apply if the employee's primary duty is directly related to the management or general business operations of the employer's customers." *Id.* In making this assessment, the 2010 AI notes that "it is necessary to focus on the identity of the customer." *Id.* The 2010 AI finds that "work for an employer's customers does not qualify for the administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes." *Id.* However, it recognizes that a mortgage loan officer "might qualify under the administrative exemption" if the customer that the officer is working with "is a business seeking advice about, for example, a mortgage to purchase land for a new manufacturing plant, to buy a building for office space, or to acquire a warehouse for storage of finished goods." *Id.* Nevertheless, the 2010 AI concludes that the typical mortgage loan officers' "primary duty is making sales for the employer [to homeowners], and because homeowners do not have management or general business operations, a typical mortgage loan officer's primary duty is not related to the management or general business operations of the employer's customers." *Id.* at 109.

Finally, the 2010 AI took exception with the 2006 Opinion Letter's apparent assumption "that the exam-

ple provided in 29 C.F.R. § 541.203(b) creates an alternative standard for the administrative exemption for employees in the financial services industry." *Id.* Rather, the 2010 AI states that 29 C.F.R. § 541.203(b) merely illustrates an example of an employee who might otherwise qualify for the exemption based on "the requirements set forth in 29 C.F.R. § 541.200." *Id.* Thus, the 2010 AI clarifies that "the administrative exemption is only applicable to employees that meet the requirements set forth in 29 C.F.R. § 541.200." *Id.* In providing this clarification, the 2010 AI states, "[t]he fact example at 29 C.F.R. § 541.203(b) is not an alternative test, and its guidance cannot result in it 'swallowing' the requirements of 29 C.F.R. § 541.200."[4] *Id.*

In summation, the DOL through the issuance of the 2010 AI explicitly withdrew the 2006 Opinion Letter "[b]ecause of its misleading assumption and selective and narrow analysis[.]" *Id.* Before taking this action, the DOL did not utilize the APA's notice and comment process. Compl. ¶¶ 32-33.

Following the issuance of the 2010 AI, the Association filed its Complaint in this case on January 12, 2011,

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[4] The 2010 AI also "expressly withdrew . . . 2001 Opinion Letter." Pl.'s Mem. at 13; Defs.' Mot. at 14 ("[T]he Wage and Hour Division withdrew the 2001 Opinion Letter as inconsistent with the analysis in the 2010 AI, inasmuch as it had erroneously concluded that mortgage loan officers performed work that was directly related to the management or general business operations of the employer or the employer's customers.").

asserting that the DOL violated the APA by issuing the 2010 AI. *Id.* ¶¶ 36-52. First, the Association argues that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* ¶ 36 (citing *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)). Second, the Association argues that "[b]ecause the AI conflicts with existing DOL regulations, and because those regulations have been afforded the force of law by courts, DOL's issuance of the 2010 AI is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Id.* ¶ 50. The Association seeks to have the 2010 AI "[v]acat[ed] and set aside" and the defendants "[e]njoin[ed] and restrain[ed] . . . from enforcing, applying, or implementing . . . the AI." *Id.* at 12 (Prayer for Relief).[5]

The Association filed its Motion for Summary Judgment simultaneously with the Complaint. In response, the DOL has filed a Cross Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment.[6]

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[5] The Association also seeks an award of its litigation costs and attorney's fees. These requests are not addressed in this opinion.

[6] In resolving these motions, the Court also considered the memorandum of law submitted on behalf of the three intervenors, Ryan Henry, Beverly Buck, and Jerome Nichols.

II. STANDARD OF REVIEW

The DOL has moved for dismissal under Federal Rule of Civil Procedure Rule 12(b)(6), and alternatively moves for summary judgment under Rule 56. Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. [And if the motion is considered under Rule 56, a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Here, because both parties have presented materials outside the pleadings (namely, the administrative record) for the Court to consider in adjudicating their motions, the Court deems it appropriate to treat both submissions as motions for summary judgment. *See Marshall Cnty. Health Care. Auth. v. Shalala*, 988 F.2d 1221, 1226 & n.5 (D.C. Cir. 1993) (noting that a district court considering a Rule 12(b)(6) motion "can consult the [administrative] record to answer the legal question[s] before the court," but that "[i]t is probably the better practice for a district court always to convert to summary judgment").

"Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius*, 684 F. Supp. 2d 42, 52 (D.D.C. 2010) (citing *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)); *see also Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977). However, due to the limited role of a court

in reviewing the administrative record, the typical summary judgment standards set forth in Rule 56(c) are not applicable. *Stuttering*, 498 F. Supp. 2d at 207 (citation omitted). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Id.* (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985)).

A reviewing court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Ludlow v. Mabus*, 793 F. Supp. 2d 352, 354 (D.D.C. 2011) (quoting 5 U.S.C. § 706(2)(A) (2006)). In *Motor Vehicle Manufacturers Ass'n of U.S. v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court explained the "arbitrary and capricious" review by noting that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. 29, 43 (1983). However, the "standard of review is a narrow one." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "The court is not empowered to substitute its judgment for that of the agency." *Id.* "[T]he party challenging

an agency's action as arbitrary and capricious bears the burden of proof," *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986), and the APA directs a reviewing court to "review the whole record or those parts of it cited by a party" in making this assessment, 5 U.S.C. § 706.

III. ANALYSIS

The plaintiff seeks relief based on two distinct theories. First, relying on *Paralyzed Veterans*, 117 F.3d at 586, the plaintiff argues that once an agency issues an authoritative interpretation of its own regulation, it must utilize the notice and comment process if it desires to modify that interpretation. Compl. ¶ 36. Second, the plaintiff argues that the 2010 AI does not comport with the 2004 regulations and is therefore "arbitrary, capricious, an abused [*sic*] of discretion, and otherwise not in accordance with law." Compl. ¶ 50. The Court will analyze each argument in turn.[7]

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[7] The Court notes that the plaintiff contends, and, in fact, takes the position that the 2010 AI is an "interpretation of [the Agency's] own regulation[], as it was signed by the Administrator of the Wage and Hour Division, published on DOL's website, and held out to employees as guidance for complying with the FLSA." Pls.' Mem. at 1. The defendants do not take exception with this position, indeed, they endorse it. Specifically the defendants state, "the 2010 *interpretation* corrected a short-lived 2006 issuance," Defs.' Mem. at 1 (emphasis added), and further concedes that it cannot be construed as a legislative rule, *see id.* at 14-16, 16 n.9 (stating that the 2010 AI is an interpretive rule as opposed to [*sic*] substantive rule, and therefore, notice and comment is not necessary). The

A. The Paralyzed Veterans and Alaska Professional Hunters Cases

It is well established that there is "no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation—even one that represents a new policy response generated by a different administration." *Paralyzed Veterans*, 117 F.3d at 586 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)). However, the District of Columbia Circuit has held that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* at 586; *Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 475 (D.C. Cir. 2007) ("[A]n agency cannot significantly change its position, cannot flip-flop, even between two interpretive rules, without prior notice and comment.").

The District of Columbia Circuit had the opportunity to reexamine its holding in *Paralyzed Veterans* in *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). *Alaska Professional Hunters* concerned an interpretation by the Federal Aviation Administration ("FAA") that several provisions of its regulations that "applied to (among others) 'commercial operator[s]'" did not "govern guide pilots whose flights were incidental to their guiding business

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Court agrees that the 2010 AI is an interpretive rule and will accordingly conduct its analysis from that perspective.

and were not billed separately." *Id.* at 1031. The FAA's position was based on its reading of the Civil Aeronautics Board's decision in *Administrator v. Marshall*, 39 C.A.B. 948 (1963). *Id.* "Although the [agency] never set forth its interpretation of [the several regulations at issue] in a written statement," the parties "agree[d] that [the] FAA personnel in Alaska consistently followed the interpretation in official advice to guides and guide services." *Id.* at 1031-32.

In January 1998, the FAA reversed course and published a "Notice to Operators" that "required the[] guide pilots to abide by FAA regulations applicable to commercial air operations." *Id.* at 1030. Drawing on its decision in *Paralyzed Veterans*, 117 F.3d at 586, the Circuit found that this modification of the FAA's longstanding policy exempting the guide pilots from the FAA regulations mandated the use of notice and comment rulemaking. *Id.* at 1035-36. The Circuit concluded that "current doubts about the wisdom of the regulatory system followed in Alaska for more than thirty years does not justify disregarding the requisite procedures for changing that system." *Id.* at 1035.

1. *Is Paralyzed Veterans still good law?*

The defendants argue that two Supreme Court cases conflict with *Paralyzed Veterans* and *Alaska Professional Hunters*. Defs.' Mot. at 15-17. First, they argue that *Paralyzed Veterans* cannot be reconciled with the holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). Defs.' Mot. at 15-17. In *Vermont Yankee*, the Supreme Court reiterated its previ-

ous conclusion "that generally speaking," the APA's notice and comment requirements "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vermont Yankee*, 435 U.S. at 524. The Supreme Court further stated that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but *reviewing courts are generally not free to impose [additional procedural requirements]* if the agencies have not chosen to grant them." *Id.* (emphasis added). The defendants argue that this limitation imposed on courts by *Vermont Yankee* conflicts with the requirements imposed by *Paralyzed Veterans*; namely, the requirement that an agency must employ the notice and comment process if they wish to change a prior interpretation of their own regulations, Defs.' Mot. at 16-17, since the Supreme Court observed that only in "extremely rare" circumstances may courts impose "procedures beyond those required by the statute," *Vermont Yankee*, 435 U.S. at 524; *see* Defs.' Mot. at 16-17.

This Court is "obligated to follow controlling [C]ircuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Thus, even if this Court "disagree[d] with circuit precedent" its "obligation" to follow such precedent would not be relieved. *Id.* Moreover, having been decided nearly twenty years before *Paralyzed Victims*, the District of Columbia Circuit was presumably aware of the existence of *Vermont Yankee* when it authored its opinion in *Paralyzed Veterans*. And this Court is not prepared

to find that the Circuit disregarded Supreme Court precedent when it decided *Paralyzed Victims*.

The defendants are correct in stating that seven courts of appeals have held that the notice and comment provisions found in section 553 of the APA do not apply to interpretative rules. Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Reply") at 9. However, this Circuit, in deciding *Paralyzed Veterans*, *Alaska Professional Hunters*, and other cases that have addressed the same subject, *see, e.g.*, *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994); *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), has ruled that if an interpretation of a statute or rule "itself carries the force and effect of law," *Paralyzed Veterans*, 117 F.3d at 588 (quotation marks and citations omitted), the agency is required to use notice and comment procedures. And this Court had the occasion to apply *Paralyzed Veterans* in a case with similarities to this case. *See Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d. 1, 13 (D.D.C. 2004), rev'd on other grounds, 437 F.3d 75 (D.C. Cir. 2006) (Walton, J.) ("[B]efore the [agency] could alter[] its earlier interpretation of the [regulation], it was required to undertake notice-and-comment rulemaking as required by the APA[.]"). Thus, this Court cannot, and will not, find that *Vermont Yankee* commands that it refuse to follow a Circuit case that was decided two decades later, and has remained good law in this Circuit for almost fifteen years.

Second, the DOL argues that *Paralyzed Veterans* and *Alaska Professional Hunters* were overturned by the recent Supreme Court decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The DOL relies on language from *Fox Television*, stating that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." Defs.' Mot. at 15 (quoting *Fox Television*, 556 U.S. at 515). *Fox Television* concerned two television live broadcasts during which expletives were used, resulting in the Federal Communication Commission's ("FCC") issuance of two "[n]otices of [a]pparent [l]iability" based on the FCC's finding that the two occurrences were "actionably indecent." 556 U.S. at 508-512. Prior to the commission of these two incidents, the FCC had permitted networks to broadcast "fleeting" expletives without punishment. *Id.* The FCC reversed course with regard to the two incidents in question, finding that the broadcasts were indecent, even though both contained only "fleeting" expletives. *Id.* at 512, 530. The Second Circuit found that the FCC's decision changing its policy was not in compliance with the APA due, in part, to its failure to provide an adequate reason for the change. *Id.* at 513-514; *see* 5 U.S.C. § 706(2)(A). On review of that ruling, the Supreme Court rejected the Second Circuit's position, "find[ing] no basis in the [APA] or in [its] opinions for a requirement that all agency change be subjected to more searching review." *Fox Television*, 556 U.S. at 514.

The language in *Fox Television* which the defendants contend invalidates *Paralyzed Veterans*, when

considered in conjunction with the entire majority opinion in *Fox Television*, implicates the APA's arbitrary and capricious review, not its notice and comment process. In fact, the Supreme Court made perfectly clear the question it was addressing, holding that "we find the [FCC's] orders neither arbitrary nor capricious." *Id.* at 530. So what the defendants are seeking to do is have this Court expand the reach of *Fox Television* beyond the question the Supreme Court actually addressed. That, this Court cannot do, as the *Fox Television* decision has no bearing on whether an agency must employ the notice and comment process before changing its policies. The answer to that question requires this Court to look to *Paralyzed Veterans* and its progeny, in the absence of en banc Circuit authority or Supreme Court repudiation of those decisions. *Torres*, 115 F.3d at 1036. Neither has occurred, so *Paralyzed Veterans* and its line of cases remains controlling authority in this Circuit.

2. *The Paralyzed Veterans Doctrine and Alaska Professional Hunters Rationale*

Having determined that *Paralyzed Veterans* remains controlling authority in this Circuit, the Court must now turn its attention to the exceptions to *Paralyzed Veterans*, which the defendants contend have been recognized by the Circuit and are relied upon by the defendants in this litigation. As the alternative position to their argument that this Court should not follow *Paralyzed Victims*, the defendants argue that these two purported exceptions to the applicability of *Paralyzed Veterans* weigh in favor of granting them summary judgment. First, they contend that *MetWest*

Inc. v. Secretary of Labor, 560 F.3d 506 (D.C. Cir. 2009), alleviates the requirement of utilizing notice and comment when a party did not "substantially and justifiably" rely upon an earlier agency interpretation. Defs.' Mot. at 22-26. Second, the defendants argue that the "invalid prior interpretation" exception purportedly recognized in *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807 (D.C. Cir. 2001), applies here. *Id.* at 18-22.

The *MetWest* case raised the question of whether MetWest could "be held liable for violating a regulation governing the removal of needles from equipment used to extract blood." 560 F.3d at 507-508. Dating back to 1991 when the needle removal regulation was adopted, the Occupation, Safety and Health Administration ("OSHA") "declined to enforce [the regulation] against employers who supplied their employees with reusable blood tube holders." *Id.* at 508-09. In October 2003, OSHA changed its policy through the issuance of a "guidance document," which stated that the use of reusable blood holders "likely violated" the regulation. *Id.* at 509. MetWest brought suit following the change, arguing that the agency was required to employ notice and comment rulemaking before altering its interpretation of the needle removal regulation. *Id.*

The Circuit in *MetWest* reiterated that its holding in *Alaska Professional Hunters* was "that an agency's practice of advising affected entities—in a prior agency adjudication and the consistent advice of agency officials over a 30-year period—that a regulation did not apply to them established 'an authoritative departmental interpretation' that could not be changed with-

out notice and comment." *Id.* at 511 (citation omitted).[8] The *MetWest* court emphasized that "[a] fundamental rationale of *Alaska Professional Hunters* was the affected parties' *substantial and justifiable reliance* on a *well-established* agency interpretation." *Id.* (emphasis added). The Circuit noted that "[t]his is a crucial part of the analysis" and that "[t]o ignore it is to misunderstand *Alaska Professional Hunters* to mean that an agency's initial interpretation, once informally adopted, freezes the state of agency law, which cannot subsequently be altered without notice-and-comment rule-making." *Id.* at 511 n.4 (citations and internal quotation marks omitted). And in *Alaska Professional Hunters*, notice and comment rulemaking was deemed necessary before an interpretation of a regulation could be changed, because, in that case, people had moved to Alaska and started businesses with the understanding that an agency's regulations did not apply to an essential component of their operations due to the position the agency had taken over a 30-year period. *Id.* at 511 (citing *Alaska Professional Hunters*, 177 F.3d at 1035 (alterations in original)). Concluding that "[t]he situation [in *MetWest* was] not comparable" to the situation in *Alaska Professional Hunters*, MetWest's challenge to the Agency action was rejected because "OSHA never established an authoritative interpretation of its regulation on which MetWest justifiably relied to its detriment." *Id.*

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[8] The *MetWest* opinion was authored by Judge Raymond Randolph, who also authored the *Alaska Professional Hunters* opinion.

The plaintiff takes exception to the defendants' claim that *MetWest* limits the applicability of *Paralyzed Veterans* to cases where a "party's reliance upon a prior interpretation [of an agency's regulation] was both substantial and justifiable." Plaintiff's Reply in Support of its Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment ("Pl.'s Reply") at 15 (internal quotation marks omitted). The plaintiff argues that "some new reliance exception to *Paralyzed Veterans*" was not created by *MetWest* because "*MetWest*'s discussion of substantial and justifiable reliance was in the content of assessing whether an *informal* interpretation by [OSHA] could even be an authoritative departmental interpretation[.]" *Id.* (internal quotation marks omitted).

While it is true that the court in *MetWest* noted that the agency "never established an authoritative interpretation of its regulation on which MetWest justifiably relied to its detriment," the court's holding was not grounded solely on that fact. *MetWest*, 560 F.3d at 511. Rather, the ruling of the circuit was also based on the assessment of whether there had been "*substantial and justifiable reliance* on a *well-established* agency interpretation" by MetWest, which was essential to imposing the notice and comment obligation on the agency. *Id.* (emphasis added). So regardless of whether *MetWest* carved out an exception to *Paralyzed Veterans* or just clarified what the court intended to convey when it said in *Alaska Professional Hunters* that the plaintiffs there had "relied" on the agency's initial interpretation, 177 F.3d at 1035, this Court is

convinced that *MetWest* intended to set the bar for what a plaintiff must establish to satisfy the reliance component of the *Paralyzed Veterans* doctrine.

The plaintiff argues alternatively that even if *MetWest* did add a substantial and justifiable reliance component to the *Paralyzed Veterans* doctrine, they "quite plainly relied, substantially and justifiably so, on the 2006 Opinion Letter." Pl.'s Reply at 17. The Association relies in part upon the Portal-to-Portal Act of 1947 for this position, *id.* at 17-25, which gives employers a complete defense to liability if they rely in good faith on the opinion of the Administrator of the Wage and Hour Division. This Act states that

> no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the [FLSA], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation. . . . "

29 U.S.C. § 259(a) (2006). In a footnote, the plaintiff points to a number of other trade associations that have been sued since the issuance of the 2010 AI, and purportedly relied upon the 2006 Opinion Letter as a defense under 29 U.S.C. § 259(a). Pl.'s Reply at 19 n.26. And the plaintiff takes exception to what it claims is the defendants' position that reliance must equate to circumstances analogous to those in *Alaska Professional Hunters*, opining that "[i]t would thus be quite odd to read the APA as requiring notice and

comment only where an industry can demonstrate it will be put out of business." *Id.* at 20. In opposition, the defendants argue that "[t]he contrast between *Alaska Professional Hunters* and the present matter is stark." Defs.' Reply at 5. They note that in *Alaska Professional Hunters*, "people uprooted their lives, moved across the country, and spent 30 years building up an entire industry in particularly substantial and justifiable reliance on an agency interpretation." *Id.* They further posit that it was precisely this reliance that "stirred the [District of Columbia] Circuit to act." *Id.* The defendants opine that "at most [the Association] and its members operated under the misapprehension that mortgage loan officers were administratively exempt for four years, and structured their pay systems accordingly, before [the] DOL corrected th[e] error." *Id.*

The Court agrees with the defendants. As noted above, the *MetWest* court stressed that a core tenant of the *Alaska Professional Hunters* decision was "substantial and justifiable reliance on a well-established agency interpretation." *MetWest*, 560 F.3d at 511. The interpretation allegedly relied upon by the Association and its members here was only in effect for a period of four years, from 2006 to 2010. *See* A.R. 87-93 (2006 Opinion Letter). Prior to that, the DOL had taken the position that mortgage loan officers were not exempt employees, and were therefore entitled to overtime pay. *See, e.g.*, A.R. 4-5 (1999 Opinion Letter). Unlike the plaintiffs in *Alaskan Professional Hunters*, here the Association does not allege that any of its members uprooted their families and moved to a new

location in search of business opportunities. Pl.'s Reply at 23. Rather, in the words of the Association itself, employees of financial service firms have merely "become accustomed to the freedom to control their own hours and breaks." *Id.* While the Court appreciates that having to keep accurate time records may impose an additional burden on the Association's members and their employees, the loss of the freedom to control one's work hours and break times is not the kind of "substantial and justifiable reliance" that *Alaskan Professional Hunters* had in mind, especially when such reliance was short lived given the *many* years that the parties had previously relied upon the interpretation that mortgage loan officers were not covered by the administrative exemption.

Further, the argument that the Association makes under the Portal-to-Portal Act actually weakens its overall position. *See* Pl.'s Reply at 17-18. As the Association points out, the Portal-to-Portal Act provides that, if the employer "proves that the [failure to pay overtime] was in good faith in conformity with and in reliance on any written administrative . . . interpretation," then the employer "shall [not] be subject to any liability or punishment." 29 U.S.C. § 259(a). Thus, assuming this provision applies, the plaintiff could not be said to have relied upon the prior interpretation to its *detriment*, as its members will not be liable for any damages resulting from the prior interpretation due to their good faith reliance. *Id.* While the Court need not reach that conclusion, it is at least worth nothing [*sic*] that the Association's invocation of the Portal-to-Portal Act undermines its position that it

"substantial[ly] and justifiabl[ly]" relied upon the 2006 Opinion Letter to the level required by the Circuit in *MetWest*, 560 F.3d at 511.

Having concluded that the association has failed to satisfy the standard for demonstrating reliance recognized in *MetWest*, the Court need not address the defendants' additional argument that notice and comment was not required for the 2010 AI based on the Circuit's decision in *Monmouth*, 257 F.3d at 807.

B. Is the 2010 AI Inconsistent with the DOL's 2004 Regulations?

The plaintiff argues that even if the 2010 AI was lawfully adopted, it is "inconsistent with the plain language of 29 C.F.R. § 541.203(b)," Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Mem.") at 26, and thus "it is arbitrary, capricious, and contrary to law," *id.* at 3. In essence, the plaintiff argues that the work performed by mortgage loan officers discussed in the 2010 AI are identical to the job duties discussed in 29 C.F.R. § 541.203(b), which provides examples of job duties that are exempt from the FLSA's overtime pay requirement. Pl.'s Mem. at 26-27. 29 C.F.R. § 541.203(b) contemplates that an employee who "collect[s] and analyz[es] information regarding the customer's income, assets, investments or debts," "determin[es] which financial products best meet the customer's needs and financial circumstances," and "advis[es] the customer regarding the advantages and disadvantages of different financial products" might be found exempt under the administrative exemption. In its memo-

randum submitted in support of its motion, the plaintiff notes that very similar language was used in the 2010 AI, but that in the 2010 AI, the DOL reached a different result in finding mortgage loan officers non-exempt from the FLSA's overtime requirement. Pl.'s Mem. at 26-27.

The DOL does not dispute that the language found in the two documents is similar. Defs.' Reply at 15. However, it contends that the job duties found in 29 C.F.R. § 541.203(b) are merely intended to provide examples of when a financial services employee might be exempt under the administrative exception. *Id.* The defendants argue that by "[a]pplying the general administrative duties test in § 541.200(a), in conjunction with the financial services example in § 541.203(b)," the 2010 AI came to the conclusion that the mortgage loan officers in question were not exempt from the FLSA's overtime pay requirement. *Id.* (citing A.R. 105-108 (Administrator's Interpretation No. 2010-01)).[9]

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[9] The defendants have offered supplemental authority—*Lewis v. Huntington National Bank*, No. C211CV0058, 2012 WL 765077 (S.D. Ohio Mar. 12, 2012)—as additional support for their position that the 2010 AI is not arbitrary and capricious. *See* Defendants' Notice of Supplemental Authority. Although the case is distinguishable from this case for a variety of reasons, the Southern District of Ohio did find that "because the [2010 AI] applies the test set forth in § 541.200(a), consistently with the example contained in § 541.203(b), there can be no serious argument that [the 2010 AI] was either erroneous or inconsistent with the 2004 revised regulations." *Lewis*, No. C211CV0058, 2012 WL 765077 at 32 (S.D. Ohio Mar. 12, 2012).

The Court finds the DOL's argument persuasive. The administrative exemption of 29 C.F.R. § 541.200, entitled "General rule for administrative employees," provides in part that an "employee employed in a bona fide administrative capacity" is one "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). The language relied upon by the plaintiff is found in 29 C.F.R. § 541.203(b), which is entitled "Administrative exemption examples," and it provides, in part, that "[e]mployees in the financial services industry *generally meet* the duties requirements for the administrative exemption. . . . However, an employee whose *primary duty* is selling financial products *does not qualify* for the administrative exemption." 29 C.F.R. § 541.203(b) (emphasis added). On its face, and considering the title of the provision, it is clear that § 541.203(b) was intended to provide examples, not an alternative test for the applicability of the administrative exception. *Id.* Thus, while financial services employees who perform the duties listed in § 541.203(b) are "generally" able to qualify for the administrative exemption, the DOL is still tasked with determining whether specific employees' "primary duty is selling financial products." *Id.* If so, the employee "does not qualify for the administrative exemption." *Id.* Given the DOL's reasoning for why the exemption does not apply here, the Court must find that the 2010 AI is not inconsistent with the 2004 regulations; thus, the 2010 AI is not

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[10]

IV. CONCLUSION

The Association has failed to satisfy the *Paralyzed Veterans* doctrine of substantial and justifiable reliance, which was also recognized in *MetWest*; thus, both their arguments as to reliance and as to notice and comment procedures must fail. Further, § 541.203(b) was not intended to serve as an alternative test for the applicability of the administrative exception. As such, the 2010 AI is not inconsistent with the 2004 regulations and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, the Court must grant in part and deny in part the Defendants' Cross-motion to Dismiss or, in the Alternative for Summary Judgment and deny the Plaintiff's Motion for Summary Judgment.

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[10] The Court is aware that there is currently a dispute between the defendants and the intervenors as to whether the 2010 AI applies both prospectively and retroactively. In resolving this case, however, the Court need not reach a conclusion on that issue, as the intervenors, the plaintiff, and the defendants acknowledge. *See* Intervenors' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion to Dismiss at 31-32 n.12; Defendants' Reply to Intervenors' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion to Dismiss at 1; Plaintiff's Reply in Support of its Motion for Summary Judgment (Response to Intervenors filed on March 14, 2012) at 3. The Court agrees with the parties and, therefore, declines to address the issue.

SO ORDERED.[11]

REGGIE B. WALTON
United States District Judge

[11] The Court will issue an Order contemporaneously with this Memorandum Opinion.

APPENDIX C

U.S. Department of Labor
Wage and Hour Division
Washington, DC 20210

[LOGO OMITTED]

Administrator's Interpretation No. 2010-1

March 24, 2010

Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

SUBJECT: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer.

Based on the Wage and Hour Division's significant enforcement experience in the application of the administrative exemption, a careful analysis of the applicable statutory and regulatory provisions and a thorough review of the case law that has continued to develop on the exemption, the Administrator is issuing this interpretation to provide needed guidance on this important and frequently litigated area of the law. Based on the following analysis it is the Administrator's interpretation that employees who perform the typical job duties of a mortgage loan officer, as described below, do not qualify as bona fide administra-

tive employees exempt under section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).

Typical Job Duties of Mortgage Loan Officers

The financial services industry assigns a variety of job titles to employees who perform the typical job duties of a mortgage loan officer. Those job titles include mortgage loan representative, mortgage loan consultant, and mortgage loan originator. For purposes of this interpretation the job title of mortgage loan officer will be used. However, as the regulations make clear, a job title does not determine whether an employee is exempt. The employee's actual job duties and compensation determine whether the employee is exempt or nonexempt. 29 C.F.R. § 541.2.[1]

Facts found during Wage and Hour Division investigations and the facts set out in the case law establish that the following are typical mortgage loan officer job duties: Mortgage loan officers receive internal leads and contact potential customers or receive contacts

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[1] This Administrator's Interpretation applies to employees who spend the majority of their time working inside their employer's place of business, including employees who work in offices located in their homes, rather than mortgage loan officers who are customarily and regularly engaged away from their employer's place of business. It also applies to employees who do not spend the majority of their time engaging in "cold-calling", contacting potential customers who have not in some manner expressed an interest in obtaining information about a mortgage loan. However, because many of the duties of all mortgage loan officers are similar, cases arising in these other contexts are referred to for guidance and cited in this interpretation.

from customers generated by direct mail or other marketing activity. Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens. They also run credit reports. Mortgage loan officers enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings. *See, e.g., Yanni v. Red Brick Mortgage*, 2008 WL 4619772, at *1 (S.D. Ohio 2008); *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (W.D. Pa. 2007); *Geer v. Challenge Financial Investors Corp.*, 2007 WL 2010957 (D. Kan. 2007), at *2; *Chao v. First National Lending Corp.*, 516 F. Supp. 2d 895, 904 (N.D. Ohio 2006), *aff'd*, 249 Fed. App. 441 (6th Cir. 2007); *Epps v. Oak Street Mortgage LLC*, 2006 WL 1460273, at *4 (M.D. Fla. 2006); *Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624, 627 (D. Md. 2005); *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *1 (D. Minn. 2002).

Exemptions from minimum wage and overtime requirements under the FLSA "are to be narrowly construed against the employers seeking to assert them

and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). To fall within the meaning of an "employee employed in a bona fide administrative capacity" an employee's job duties and compensation must meet all of the following tests:

1. The employee must be compensated on a salary or fee basis as defined in the regulations at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200.

This interpretation focuses on the application of the second test to employees who perform the typical jobs duties of a mortgage loan officer:

> Whether the primary duty of employees who perform the typical job duties of a mortgage loan officer is office or non-manual work directly related to the management or general business operations of their employer or their employer's customers.

Primary Duty is Work Directly Related to the Management and General Business Operations of the Employer.

An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). To be exempt, a mortgage loan officer's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). In turn, to be work directly related to the management or general business operations of the employer, the work must be "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Work directly related to management or general business operations of an employer includes work in functional areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations, and similar areas. 29 C.F.R. § 541.201(b).

Thus, the administrative exemption is "limited to those employees whose primary duty relates 'to the administrative as distinguished from the production operations of a business.'" 69 Fed. Reg. 22122, 22141 (April 23, 2004), quoting the 1949 Weiss Report. In other words, "it relates to employees whose work involves servicing the business itself—employees who 'can be described as staff rather than line employees.'" *Id.*, quoting the 1940 Stein Report.

This "production versus administrative" dichotomy is intended to distinguish "between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002), quoting *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990); *see Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2nd Cir. 2009) ("[W]e have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (the dichotomy distinguishes between "those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market"); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (same). Thus, the dichotomy is "a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption." 69 Fed. Reg. at 22141. Moreover, the dichotomy is "determinative if the work 'falls squarely on the production side of the line.'" *Id.*, quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d at 1127; *see* Wage and Hour Opinion Letter FLSA2006-45 (Dec. 21, 2006) (copy editors working for a marketing firm that promotes the sale of books, who read and correct the firm's marketing promotional materials, fall squarely on the production side of the line

and, therefore, are not exempt); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (background investigators working for a company that contracts with the government to conduct security clearance investigations of potential government employees perform the day-to-day production work of their employer and, therefore, are not exempt).

Work does not qualify as administrative simply because it does not fall squarely on the production side of the line. As the court stated in *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004), while production work cannot be administrative, there is no "absolute dichotomy under which all work must either be classified as production or administrative." The court rejected the company's argument that its information technology support specialists were administrative employees because they performed troubleshooting on computers on individual employees' desks and were not directly involved with the nuclear power plant equipment that "produced" electricity. Otherwise, the court asserted, employees such as "the janitorial staff, the security guards, the cooks in the cafeteria, and various other workers" would be viewed as doing administrative work. *Id.*; *see Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 402-03 (6th Cir. 2004) (employee who was primarily responsible for shipments of radioactive materials and waste away from the plant, setting up shipments with the transporter and waste management facility, determining the type of packaging to be used, preparing manifests, inspecting containers, etc., is not engaged in administrative work simply because he is engaged in an

activity collateral to the principal business purpose of producing electricity; duties must be related to servicing the business itself to be administrative).

The decision in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991), *cert. denied*, 503 U.S. 936 (1992), in which the Third Circuit evaluated the status of inside salespersons who sold electrical products for their employer, is instructive. The court found that such inside salespersons were production workers who did not qualify for the administrative exemption because the company's primary business purpose was to sell electrical products. The court concluded that the salespersons did not "service" the business simply because they engaged in negotiations and represented the employer in their sales efforts, because such negotiations over the price and other terms of the sale "are 'part and parcel' of the activity of 'producing sales'." *Id.* at 904. Accordingly, any such duties undertaken "in the course of ordinary selling do not constitute administrative-type 'servicing' of Cooper's wholesale business . . . These activities are only routine aspects of sales *production*." *Id.* at 905 (emphasis in original); *see* Wage and Hour Opinion Letter of July 23, 1997, 1997 WL 970727 (although "marketing activity geared to furthering a company's overall sales effort," such as performing public relations or advertising or designing a company's overall sales campaign, is administrative work, engaging in "ordinary day-in-day-out selling activity directed at making specific sales" is not).

The court in *Casas v. Conseco* applied these principles to mortgage loan officers and held that they were

"production rather than administrative employees. Conseco's primary business purpose is to design, create and sell home lending products. As loan originators making direct contact with customers, it is plaintiffs' primary duty to sell these lending products on a day-to-day basis." 2002 WL 507059, at *9. The court concluded that the loan officers were unlike the exempt marketing representatives in *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997). The representatives in *John Alden* were engaged in more than routine selling efforts focused on particular sales transactions; their marketing efforts were aimed at independent insurance agents and were directed more broadly toward promoting and increasing the company's sales generally. However, because Conseco's loan officers' duties were "selling loans directly to individual customers, one loan at a time," 2002 WL 507059, at *9, the court held that the administrative exemption did not apply. *Accord Wong v. HSBC Mortgage Corp.*, 2008 WL 753889, at *7 (N.D. Cal. 2008) (granting summary judgment to plaintiffs with regard to the administrative exemption because "defendants have not identified any evidence to support a finding that plaintiffs' primary duty is something other than sales"). The preamble to the 2004 Final Rule distinguished between *Casas* and *John Alden* (and other insurance industry cases), emphasizing the difference between employees who have a primary duty of sales and employees who spend the majority of their time on a variety of duties such as promoting the employer's financial products generally, deciding on an advertising budget and techniques, running an office,

hiring staff and setting their pay, servicing existing customers (by providing insurance claims service), and advising customers. 69 Fed. Reg. at 22145-46; *see Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *8 (denying defendant's motion for summary judgment on the administrative exemption, stating that plaintiff's evidence indicated that the loan officers' primary duty is to generate loan sales, rather than assisting in the administrative operations, and that they have duties "flatly distinguishable from those of the insurance industry employees" in the cases discussed in the preamble).

The case law and regulatory distinction between servicing the business and routine sales work requires an examination of whether an employee who performs the typical job duties of a mortgage loan officer has the primary duty of making sales. The regulations implementing the section 13(a)(1) exemption for "outside" sales employees identify some of the factors that should be considered in determining whether an employee's primary duty is making sales. The regulations state that among the factors to be considered in determining whether an employee has a primary duty of making outside sales are: the employee's job description; the employer's qualifications for hire; sales training; method of payment; and proportion of earnings directly attributable to sales. 29 C.F.R. § 541.504(b); *see Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004) (relevant factors in evaluating whether an employee has a primary duty of outside sales include whether the employee solicits customers, receives sales training, is compen-

sated by commission, is labeled a salesman, is held to a production standard, and has freedom from supervision); *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *2 (W.D. Mo. 2006) (similar factors).[2] Moreover, in determining whether an employee's primary duty is making sales, the work performed incidental to sales should be [sic] also be considered sales work. *See Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *9 and n.20 (loan officers compile and analyze potential customers' financial data because "doing so is necessary to evaluate the customers' qualifications for a loan, *i.e.*, to make a sale." They are not analyzing the information to provide advice to the customer, which the customer could take and use elsewhere. Rather, the loan officers are performing "*screening* for the benefit of the employer, rather than *servicing* for the benefit of the customer.") (emphasis in original); *see also* 29 C.F.R. § 541.500(b) ("work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences").[3] Applying these

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[2] Of course, section 13(a)(1) only exempts "outside" salesmen.

[3] Because work performed incidental to and in conjunction with the employee's own sales or solicitations is considered exempt sales work, the Administrator rejects the September 8, 2006 Wage and

factors to the job duties mortgage loan officers typically perform leads to the conclusion that they have a primary duty of making sales.

Further, in addition to the job duties described above, the facts set out in the case law demonstrate that historically mortgage loan officers were often compensated entirely by commissions, and that today many mortgage loan officers continue to be paid primarily by commissions, sometimes with a base wage, salary, or draw against the commissions. The commissions are based upon sales that are completed (*i.e.*, loans that actually close), with the commission amount typically based upon the value of the loan. *See, e.g., Underwood v. NMC Mortgage Corp.*, 2009 WL 1269465, at *1 (D. Kan. 2009) (repayable draw against commissions of $1,400 per month until early 2005; afterwards a minimum salary of $1,000 per month plus commissions); *Henry v. Quicken Loans Inc.*, 2009 WL 596180, at *10 (E.D. Mich. 2009) (minimum base salary plus commissions); *McCaffrey v. Mortgage Sources Corp.*, 2009 WL 2778085, at **2-3 (D. Kan. 2009) (commissions only); *Yanni v. Red Brick Mortgage*, 2008 WL 4619772, at **1-3 (commissions only, based on loans that closed); *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (base salary plus commissions, with commissions earned subject to off-set for failure to meet a minimum

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Hour Opinion Letter FLSA2006-31's inappropriately narrow definition of sales as including only "customer-specific persuasive sales activity," which is the time that a loan officer spends directly engaged in selling mortgage loan products to customers.

sales goal in a prior pay period); *Saunders v. Ace Mortgage Funding, Inc.*, 2007 WL 1190985, at **2-3 (D. Minn. 2007) (commissions only until June 2005, with a minimum guarantee treated as a draw against future commissions after that); *Chao v. First National Lending Corp.*, 516 F. Supp. 2d 895, 904-05 (commissions only, based on loans that closed). Such payment methods support the conclusion that a mortgage loan officer's primary duty is sales.

In addition, employers often train their mortgage loan officers in sales techniques and evaluate their performance on the basis of their sales volume, factors that also are relevant to the analysis of mortgage loan officers' primary duty. For example, in *Epps v. Oak Street Mortgage LLC*, 2006 WL 1460273, at *5, loan officers were required to meet a production goal of closing three loans per month, and were evaluated using a form that focused in part on whether they met their sales requirements. They were required to work on Saturday if they did not meet their sales requirements, and numerous loan officers were disciplined or terminated for failing to meet their sales requirements, as were their managers. *See Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (such employees "are hired, trained, earn commissions, and are otherwise successful in their positions, on the basis of their sales performance"); *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *1 (employees "were trained as salespeople in order to learn the mortgage business and to increase their individual sales efforts"); *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 (numerous separation notices

showed that their "performance was measured largely according to their sale production"). These factors also support the conclusion that a mortgage loan officer's primary duty is making sales.

Moreover, many employers defending against FLSA lawsuits brought by mortgage loan officers argue that the employees are exempt under section 13(a)(1) as outside sales employees. In these cases, the issue is whether the mortgage loan officers are *outside* salespeople or *inside* salespeople, but the employer concedes their primary duty is sales (a required element of this exemption).[4] Thus, mortgage companies' own defenses are consistent with the conclusion that a loan officer's primary duty is sales.[5]

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[4] *See McCaffrey v. Mortgage Sources Corp.*, 2009 WL 2778085, at *4; *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 527 F. Supp. 2d 1053, 1066 (N.D. Cal. 2007); *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 640 (S.D. Cal. 2007); *Chao v. First National Lending Corp.*, 516 F. Supp. 2d at 900; *Geer v. Challenge Financial Investors Corp.*, 2005 WL 2648054, at **2-3; *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *1; *Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d at 549-50; *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at **10-11.

[5] Some employers have argued that loan officers are exempt under section 7(i), 29 U.S.C. § 207(i), as commissioned employees of a retail or service establishment who receive more than half their earnings from commissions. In these cases, the primary issue is whether the employer qualifies as a retail or service establishment. *See Underwood v. NMC Mortgage Corp.*, 2009 WL 1269465, at **2-3; *Wong v. HSBC Mortgage Corp.*, 2008 WL 753889, at **7-8; *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 527 F. Supp. 2d at 1066; *Pontius v. Delta Financial Corp.*, 2007 WL

Finally, courts have repeatedly found that mortgage loan officers who work inside their employer's place of business have a primary duty of sales. *See Chao v. First National Lending Corp.*, 516 F. Supp. 2d at 901 ("[t]here is no question that the primary purpose of loan officers employed by FNL is to make sales or obtain orders or contract for services."); *Barnett v. Washington Mutual Bank*, 2004 WL 1753400, at *7 (N.D. Cal. 2004) (mortgage loan officers working at a nationwide call center "were engaged primarily in selling a product, namely, home mortgages"); *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 ("[a]s loan originators making direct contact with customers, it is plaintiffs' primary duty to sell these lending products on a day-to-day basis."). Indeed, the Administrator is not aware of any court that has found that mortgage loan officers—working either inside or outside—have a primary duty other than sales.

Thus, a careful examination of the law as applied to the mortgage loan officers' duties demonstrates that their primary duty is making sales and, therefore, mortgage loan officers perform the production work of their employers. Work such as collecting financial information from customers, entering it into the computer program to determine what particular loan products

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1496692, at *3; *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. at 640; *Gatto v. Mortgage Specialists of Illinois, Inc.*, 442 F. Supp. 2d at 536-42; *Barnett v. Washington Mutual Bank*, 2004 WL 1753400, at **2-6; *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at **3-5. This defense also is consistent with an employee having a primary duty of sales.

might be available to that customer, and explaining the terms of the available options and the pros and cons of each option, so that a sale can be made, constitutes the production work of an employer engaged in selling or brokering mortgage loan products. Such duties do not relate to the internal management or general business operations of the company; they do not involve servicing the business itself by providing advice regarding internal operations, unlike the duties of employees working in, for example, a firm's human resources department, accounting department, or research department. The typical job duties of a mortgage loan officer comprise a financial services business' marketplace offerings, the selling of loan products. Their duties involve the day-to-day carrying out of the employer's business and, thus, fall squarely on the production side of the business.

Work Related to the Management or General Business Operations of the Employer's Customers

The administrative exemption can also apply if the employee's primary duty is directly related to the management or general business operations of the *employer's customers*. "Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt." 29 C.F.R. § 541.201(c).

To determine whether a mortgage loan officer's duties are directly related to the management or general business operations of the employer's customers, it is necessary to focus on the identity of the customer. As

the preamble to the final rule explained in addressing the provision that advisers and consultants could qualify for the administrative exemption based upon their work for the employer's customers:

> Nothing in the existing or final regulations precludes the exemption because the customer is an individual, rather than a business, as long as the work relates to management or general business operations. As stated by commenter Smith, the exemption does not apply when the individual's 'business' is purely personal, but providing expert advice to a small business owner or a sole proprietor regarding management and general business operations, for example, is an administrative function . . . This provision is meant to place work done for a client or customer on the same footing as work done for the employer directly, regardless of whether the client is a sole proprietor or a Fortune 500 company, as long as the work relates to 'management or general business operations.'

69 Fed. Reg. at 22142.

Thus, work for an employer's customers does not qualify for the administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes. Individuals acting in a purely personal capacity do not have "management or general business operations" within the meaning of this exemption. However, if the customer is a business seeking advice about, for example, a mortgage to purchase land for a new manufacturing plant, to buy a building for office

space, or to acquire a warehouse for storage of finished goods, the advice regarding such decisions might qualify under the administrative exemption.[6] *See Bratt v. County of Los Angeles*, 912 F.2d at 1070 (stating, with regard to employees like stock brokers and insurance claims agents, "[t]o the extent that these employees primarily serve as general financial advisors or as consultants on the proper way to conduct a business, *e.g.*, advising businesses how to increase financial productivity or reduce insured risks, these employees properly would qualify for exemption under this regulation."); *Talbott v. Lakeview Center, Inc.*, 2008 WL 4525012, at *5, n.5 (N.D. Fla. 2008) (in context of firm that provides foster care and child protective services, provision pertaining to the employer's customers is not "relevant because even if Lakeview's foster clients are 'customers,' they do not have 'general business operations.'").[7]

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[6] Of course the salary test and the test that the primary duty requires the exercise of discretion and independent judgment with respect to matters of significance must also be met.

[7] *See also* Wage and Hour Opinion Letter FLSA2007-7 (Feb. 8, 2007) (case managers working for a service provider for individuals with disabilities are performing the day-to-day production work of their employer and are not "providing administrative services to the employer's customers as contemplated in 29 C.F.R. § 541.201(c)"); Wage and Hour Opinion Letter FLSA2005-30 (Aug. 29, 2005) (same); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (background investigators of private firm that conducts security clearance investigations of potential hires for government agencies could be viewed as performing work related to

Based on the above analysis of the typical mortgage loan officer's duties and conclusion that his or her primary duty is making sales for the employer, and because homeowners do not have management or general business operations, a typical mortgage loan officer's primary duty is not related to the management or general business operations of the employer's customers.

Application of 29 C.F.R. § 541.203(b)

Wage and Hour Opinion Letter FLSA2006-31 (Sept. 8, 2006) appears to assume that the example provided in 29 C.F.R. § 541.203(b) creates an alternative standard for the administrative exemption for employees in the financial services industry. That regulation states:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the *customer's* income, assets, investments or debts; determining which financial products best meet the *customer's* needs and financial circumstances; advising the *customer* regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. *However, an employee whose primary duty is selling financial*

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the management or general business operations of the employer's customers).

products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b) (emphasis added).[8] Contrary to the assumption in Opinion Letter FLSA 2006-31, the administrative exemption is only applicable to employees that meet the requirements set forth in 29 C.F.R. § 541.200. The regulation at 29 C.F.R. § 541.203(b) merely provides an example to help distinguish between those employees in the financial services industry whose primary duty is related to the management or general operations of the employer's customers and those whose primary duty is selling the employer's financial products. The fact example at 29 C.F.R. § 541.203(b) is not an alternative test, and its guidance cannot result in it "swallowing" the requirements of 29 C.F.R. § 541.200.

As discussed above, mortgage loan officers typically have the primary duty of making sales on behalf of their employer; as such, their primary duty is not directly related to the management or general business operations of their employer or their employer's customers. Because of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA2006-31 does not comport with this interpretive

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[8] The case law and the Department's enforcement experience indicate that the duty listed last, pertaining to general promotion work for the employer, is a minor aspect of a typical loan officer's job. Moreover, to the extent that such promotion work is performed incidental to and in conjunction with an employee's own sales or solicitations, it is sales work. *See* 29 C.F.R. § 541.503(a).

guidance and is withdrawn. Similarly, an Opinion Letter dated February 16, 2001, 2001 WL 1558764, also is withdrawn as inconsistent with this analysis.

Conclusion

Based upon a thorough analysis of the relevant factors, the Administrator has determined that mortgage loan officers who perform the typical duties described above have a primary duty of making sales for their employers and, therefore, do not qualify as bona fide administrative employees exempt under section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).

APPENDIX D

[SEAL OMITTED]

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2006-31

September 8, 2006

Dear Name*:

This is in response to your request for an opinion concerning the application of the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(1) (copy enclosed), and the implementing regulations at 29 C.F.R. Part 541 (copy enclosed), to certain employees employed as mortgage loan officers. Based on the analysis below, it is our opinion that the mortgage loan officers you describe are exempt administrative employees.

You state that, in the industry, other job titles for referring to mortgage loan officers include "mortgage loan representatives," "mortgage loan consultants," "mortgage loan originators," "mortgage bankers," and similar titles. Our response collectively refers to all such employees as "mortgage loan officers." Please note, however, that an employee's exempt status is not determined based on job title or job classification; rather, it is determined by analyzing each particular employee's actual job duties and compensation under

the applicable regulations. "The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2.

You indicate that mortgage loan officers work under various business models and their duties vary accordingly. The particular mortgage loan officers in your request spend the majority of their working time inside their employer's place of business (or inside the employees' offices located in their homes), although some also may meet with customers or referral sources such as realtors or builders away from the office. Your request specifically does not address mortgage loan officers who are customarily and regularly engaged away from their employer's place(s) of business (or away from their home offices) who may be considered for possible exemption under the outside sales exemption defined at 29 C.F.R. § 541.500.[1] In addition, employees who spend the majority of their time inside the office prospecting for potential customers who have not previously expressed an interest in obtaining information about a mortgage loan (*e.g.*, employees in a call center environment primarily selling financial products as "outbound telemarketers") are outside the

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[1] See *Opinion Letter FLSA2006-11* (March 31, 2006) (mortgage loan officers who customarily and regularly engage in making sales away from their employer's place of business qualify for the outside sales exemption because "[t]heir principal duty is the sale of mortgage loan packages").

scope of your request. Further, "loan processors," who coordinate appraisals and title work and review the customers' supporting financial documents (*e.g.*, pay stubs, W-2s, bank statements, and tax returns for self-employed individuals) to determine whether they meet the documentation requirements associated with the mortgage loan, are also specifically outside the scope of your request.

You describe the primary duties of the mortgage loan officers as follows. Mortgage loan officers work with the employer's customers to assist them in identifying and securing a mortgage loan that is appropriate for their individual financial circumstances and is designed to help them achieve their financial goals, including home ownership. Mortgage loan officers respond to and follow up on customer inquiries (sometimes referred to as "leads") that come from several sources. The loan officer will collect and analyze the customer's financial information and assess the customer's financial circumstances to determine whether the customer and the property qualify for a particular loan. This involves inquiries into the customer's income, assets, investments, debt, credit history, prior bankruptcies, judgments, and liens, as well as characteristics of the property and similar information. The loan officer will also advise the customer about the risks and benefits of the loan alternatives, including the options and variables involved. Many mortgage banking companies offer multiple mortgage products, resulting in hundreds of loans to choose from, requiring specific analysis, evaluation, and advice from the

loan officers. Loan officers must also stay up-to-date on changes in market conditions.

Additionally, some loan officers use technological tools to help them serve their customer's needs. For example, loan officers may use computer software to assist in the underwriting process by helping evaluate whether the customer qualifies for the loan. These products assist the loan officer in communicating a loan prequalification, loan pre-approval, or qualified loan approval. You emphasize, however, that these tools do not substitute for the discretion and judgment required of the loan officer; and the loan officer is responsible for recommending the best products for the customer.

You describe the sales component of the mortgage loan officer's duties, *i.e.*, when he or she spends time selling mortgage loan products to customers, as "customer-specific persuasive sales activity, such as encouraging an individual potential customer to do business with his or her employer's mortgage banking company rather than a competitor, or to consider the possibility of a mortgage loan if they have not expressed prior interest." You contrast this sales activity with "marketing, servicing or promoting the employer's financial products," which you describe as the marketing of the employer's mortgage banking company or products generally, as well as the promotion of brand awareness and the creation of demand among realtors, builders, developers, and other entities. You state that both the customer-specific persuasive sales activity and the more general marketing or promoting activities may take place during the same discussion with the cus-

tomer. You ask that we assume for purposes of responding to your request that less than 50 percent of the mortgage loan officer's working time over a representative period is spent on customer-specific persuasive sales activity.

You acknowledge in your request that the administrative exemption requires payment on a salary or fee basis at a rate of not less than $455 per week. While you do not specify the particular compensation arrangements for the mortgage loan officers in question, you ask that we assume in responding to your request that they are paid on a salary basis at a rate of at least $455 per week.

You seek an opinion on three questions: (1) whether the principles for determining whether employees in the financial services industry are administratively exempt under the new regulations also apply under the prior regulations; (2) whether the mortgage loan officers described above meet the administrative duties test set forth for employees in the financial services industry as an example of the administrative exemption in 29 C.F.R. § 541.203(b); and (3) whether employees in the financial services industry who meet the duties requirements as described in section 541.203(b) exercise sufficient discretion and independent judgment even though they may use certain underwriting software programs or tools.

In response to your first question, FLSA section 13(a)(1) provides an exemption from the minimum wage and overtime provisions for "any employee employed in a bona fide executive, administrative, or

professional capacity," as those terms are defined in 29 C.F.R. Part 541. An employee may qualify for exemption if all the regulatory tests relating to duties and salary are met. The regulations were revised effective August 23, 2004 (69 Fed. Reg. 22,122 (Apr. 23, 2004)). Because the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, the outcome of this opinion would be essentially identical under either version of the regulations. *See Robinson-Smith v. Gov't Employees Ins. Co.*, 323 F. Supp. 2d 12 (D.D.C. 2004); *McLaughlin v. Nationwide Mut. Ins. Co.*, No. Civ. 02-6205-TC, 2004 WL 1857112 (D. Or. 2004).

Regarding your second question, under 29 C.F.R. § 541.200(a), "[t]he term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act" means "any employee":

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Id.

Work that is "directly related to the management or general business operations" of the employer is defined as "work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a).

"The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee," but time alone "is not the sole test." 29 C.F.R. § 541.700(b).

Section 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) "[e]mployees in the financial services industry." Such employees are ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

> work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting

> the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b).[2] The preamble to the 2004 regulations reviewed the pertinent case law drawn from the financial services industry and concluded:

> The Department agrees that employees whose primary duty is inside sales cannot qualify as exempt administrative employees. However, as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general

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[2] The preamble also recognizes that some selling activity may occur without causing loss of the administrative exemption for employees in the financial services industry, as long as selling financial products is not the employee's primary duty. You ask in your request that we assume that less than 50 percent of the mortgage loan officer's working time over a representative period is spent on "customer-specific persuasive sales activity." As noted earlier, an employee's primary duty is defined in 29 C.F.R. § 541.700 as "the principal, main, major or most important duty the employee performs" based on all the facts in a particular case, with the major emphasis on "the character of the job as a whole," and the amount of time spent performing particular tasks is not the sole test.

business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

69 Fed. Reg. at 22,146 (copy enclosed). *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002).

You describe the duties of mortgage loan officers here as collecting and analyzing the customer's financial information and assessing the customer's financial circumstances to determine whether the customer and the property qualify for a particular loan. This involves inquiries into the customer's income, assets, investments, debt, credit history, prior bankruptcies, judgments, and liens, as well as characteristics of the property and similar information. The loan officer will also advise the customer about the risks and benefits of the loan alternatives, including the options and variables involved. The mortgage loan officer must analyze the information provided by the customer and advise on an array of options and variables, all of which make up the various components of the loan.

Your description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Based upon the foregoing, we conclude that these mortgage loan officers satisfy the duties requirement under 29 C.F.R. § 541.203(b).[3]

The mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer, and by performing duties that include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. § 541.200(a)(2)-(3). Similar to the employees discussed in the 2004 preamble in the *John Alden*, *Hogan*, and *Wilshin* cases—all of whom were found to satisfy the duties requirements of the administrative exemption—the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products. *See John Alden*, 126 F.3d at 8-14 (administrative exemption applied to insurance marketing representatives who represented the company to third party agents, promoted sales, and kept informed about the market to help match products with customer needs); *Hogan*, 361 F.3d at 626-28 (insurance agents administratively exempt who serviced and advised existing customers, adapted customer's policies to their needs, promoted sales, and hired and trained staff among

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[3] Of course if, based on all the facts in a particular case, a mortgage loan officer's primary duty is selling mortgage loans, the mortgage loan officer will not qualify for the administrative exemption. 29 C.F.R. § 541.203(b).

other duties); *Wilshin*, 212 F. Supp. 2d at 1376-79 (administrative exemption applied to insurance agent who stayed knowledgeable about the market and needs of customers, recommended products to clients, provided claims help, promoted the company, and directed the day-to-day affairs of the office).

With regard to your third question, the use of software programs or tools to assess risk and to narrow the scope of products available to the customer does not necessarily disqualify the employees from the administrative exemption for lack of discretion and independent judgment. The regulations describe the requirement of discretion and independent judgment as follows:

> To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

29 C.F.R. § 541.202(a).

As provided in section 541.202(b):

> The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the

> question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

Section 541.202(c) describes an employee's exercise of discretion and independent judgment as including the authority to make an independent choice that is free from immediate direction or supervision. However,

"[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." *Id.* Section 541.202(e) further clarifies that the "exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." The regulations note that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." 29 C.F.R. § 541.202(f). Further, "[t]he use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act." 29 C.F.R. § 541.704. The use of "well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances," however, does not meet the "exercise of discretion and independent judgment" requirement. *Id.*

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202(a). In your letter, you

stated that some software programs display available products along with their qualification requirements, terms, and prices, many of which change on a daily or even more frequent basis. These programs enhance the mortgage loan officer's ability to evaluate the products, options, and variables available to determine which mortgage products might serve the customer's needs. So long as these programs do not select the mortgage loan product for the mortgage loan officer and the mortgage loan officer is still responsible for assessing the alternatives and making recommendations to the customer, the use of technological tools would not mean that the mortgage loan officer does not exercise the necessary discretion and independent judgment.

Based on the foregoing analysis, we conclude that the mortgage loan officers described above satisfy the duties requirements of the administrative exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investiga-

tion or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Paul DeCamp
Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5246

MORTGAGE BANKERS ASSOCIATION, APPELLANT

v.

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, ET AL., APPELLEES

No. 1:11-cv-00073-RBW

Filed: Oct. 2, 2013

ORDER

Before: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges; SENTELLE, Senior Circuit Judge

Upon consideration of the petition of appellees Jerome Nickols, Ryan Henry, and Beverly Buck for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX F

1. 5 U.S.C. 551 provides:

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration,

charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

2. 5 U.S.C. 553 provides:

Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or

otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an

agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

3. 5 U.S.C. 554 provides:

Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

---

[1] So in original.

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

4. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

6. 29 U.S.C. 259 provides:

Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act,1 if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

OPPOSITION BRIEF

RECORD AND BRIEFS

Nos. 13-1041, 13-1052

FILED
MAY 2 - 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF THE DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTION PRESENTED

Whether the D.C. Circuit's factbound application of its *Paralyzed Veterans* doctrine—which has been applied only three times in the last two decades to require notice and comment where an agency issues an interpretation of a regulation that squarely conflicts with the agency's prior authoritative interpretation—warrants this Court's review.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Thomas E. Perez, Secretary of Labor, and Jerome Nickols, Ryan Henry, and Beverly Buck.

Respondent is the Mortgage Bankers Association, which has no parent corporation and does not issue stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceeding And Rule 29.6 Statement	ii
Statement	1
Reasons For Denying The Petitions	12
I. Serious Mootness Concerns Would Likely Prevent This Court From Reaching And Resolving The Question Presented	12
II. The Asserted Circuit Split Is More Theoretical Than Real	13
III. The Question Presented Arises Infrequently And Has Limited Practical Importance	19
IV. *Paralyzed Veterans* Is Correct And Consistent With This Court's Decision In *Vermont Yankee*	21
V. This Case Is A Poor Vehicle	25
Conclusion	27

TABLE OF AUTHORITIES

Page

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Abraham Lincoln Mem'l Hosp. v. *Sebelius*, 698 F.3d 536 (7th Cir. 2012) 14, 15

Air Transp. Ass'n of Am. v. *FAA*, 291 F.3d 49 (D.C. Cir. 2002).....24

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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5 U.S.C. § 553 ..... 21, 25

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29 C.F.R. § 541.200 ..... 3, 4, 8

29 C.F.R. § 541.203 ..... 4, 6

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT

For nearly two decades, the D.C. Circuit has held that "when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the Administrative Procedure Act] without notice and comment," as established in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Professional Hunters Ass'n, Inc.* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (Randolph, J.).

In all that time, the D.C. Circuit has applied its *Paralyzed Veterans* doctrine only three times—including in the case at bar—to require that an agency engage in notice-and-comment rulemaking. Indeed, in this case, the D.C. Circuit pointedly took "no position on the merits" of the Department of Labor interpretation at issue, emphasizing that "[i]f the [Department] wishes to readopt the later-in-time interpretation, it is free to," but it must "conduct the required notice and comment rulemaking." App. 3a.[1]

Shortly after the petitions in this case were filed, the President directed the Secretary of Labor to accept the D.C. Circuit's invitation and "propose revisions to modernize and streamline the existing

[1] For convenience, all citations will be of the appendix attached to the government's petition.

overtime regulations." Presidential Memorandum, *Updating & Modernizing Overtime Regulations*, 79 Fed. Reg. 15,209, 15,211 (Mar. 18, 2014). Accordingly, the underlying issue in this case is or soon will be moot. This Court need not devote its limited resources to reviewing agency action when the President has directed the Secretary of Labor to review that very same action in new proposed regulations. This Court's review of the D.C. Circuit's factbound application of its *Paralyzed Veterans* doctrine is thus unwarranted.

Moreover, petitioners' claims of a circuit split are overblown, the issue arises only rarely and is of limited practical importance, and the doctrine does not appear to have unduly hampered agency decisionmaking in the nearly two decades it has been in existence. In all events, if petitioners are right about the frequency with which the question arises, then it should not be too long before a better vehicle—with no mootness problems—comes along. The petitions should be denied.

1. Under the Fair Labor Standards Act ("FLSA"), see 29 U.S.C. §§ 201-219, covered employers must pay overtime wages to an employee who works more than 40 hours per week, unless the employee is exempt. 29 U.S.C. § 207(a)(1). Section 13(a) of the FLSA expressly exempts from those overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity[,] * * * or in the capacity of outside salesman," as those terms are "defined and delimited from time to time by regulations

of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551-559]." 29 U.S.C. § 213(a)(1). These are the so-called "white-collar exemptions."

In 1940, the Department of Labor promulgated regulations defining the administrative exemption as applying to employees who, among other things, perform work "directly related to management policies or general business operations." 5 Fed. Reg. 4077 (Oct. 15, 1940). In 1949, the Department revised this requirement to provide that an administratively exempt employee is one "[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers." 14 Fed. Reg. 7705, 7706 (Dec. 24, 1949). This definition remained unchanged for over 50 years.[2]

2. In 2004, after engaging in notice-and-comment rulemaking, the Department issued revised regulations addressing various FLSA exemptions, including the administrative exemption. The 2004 regulations retained the 1949 "primary duty" test without change: an administrative exempt employee is still one whose "primary duty is the performance of

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[2] The administrative exemption also requires that the employee be paid at least $455 per week (on a salary or fee basis), and that his primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200. Those requirements are not at issue in this case.

office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2).

The pertinent regulations did, however, contain a new section (29 C.F.R. § 541.203) giving examples of administratively exempt employees. Those examples included "employees in the financial services industry," whose "duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products." 29 C.F.R. § 541.203(b).

An employee "whose *primary duty* is selling financial products does not qualify for the administrative exemption." *Ibid.* (emphasis added). But as the Department repeatedly made clear in the preamble to the 2004 regulations, the administrative exemption can still apply even if employees also do some selling to consumers. See Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004).

For example, the Department noted approvingly that the Eleventh Circuit held insurance agents to be exempt employees "even though they also sold

insurance products directly to existing and new customers." *Ibid.* (citing *Hogan* v. *Allstate Ins. Co.*, 361 F.3d 621, 628 (11th Cir. 2004)). The Department also cited with approval a district-court decision holding that "selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—was not enough of a distinction to negate his exempt status." *Ibid.* (citing *Wilshin* v. *Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1377-79 (M.D. Ga. 2002)).

The Department thus explained that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." *Id.* at 22,146. Specifically, the Department confirmed that "[s]ervicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment" such that the administrative exemption applies. *Ibid.*

3. In September 2006, the Department issued an administrator opinion letter in response to respondent's inquiry regarding the status of mortgage loan officers under the new 2004 regulations. App. 70a-84a.

The opinion letter was signed by the Administrator of the Wage and Hour Division, published on the

Department's website, and held out to employers as the Department's definitive interpretation of its regulations. App. 18a, 84a.

In its opinion letter, the Department determined that mortgage loan officers typically perform administratively exempt duties. App. 83a. The Department first cited the examples provided in the 2004 regulations, noting that they specifically include "'[e]mployees in the financial services industry.'" *Id.* at 76a (citing 29 C.F.R. § 541.203(b)) (alteration in original). The Department further noted that cases cited in the preamble to those regulations hold that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to customers." *Id.* at 77a (quoting 69 Fed. Reg. at 22,146). The Department thus determined that the

> description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Id. at 78a.

Therefore, "[s]imilar to the employees [in the cases cited in the 2004 preamble]—all of whom were found

to satisfy the duties requirements of the administrative exemption—the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products." App. 79a (citations omitted). The Department thus concluded that the "mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer." *Ibid.*[3]

4. Four years later, in March 2010, the Department abruptly announced that going forward, it would sharply limit the use of opinion letters and instead rely on *sua sponte* "administrator interpretations" as the Department's primary vehicle for interpreting the pertinent statutes and regulations. The first of these (the "2010 administrator interpretation") dealt with mortgage loan officers. App. 49a. It was issued with no prior notice and no opportunity for public comment.

The 2010 administrator interpretation withdrew the 2006 opinion letter—which determined that

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[3] The Department further concluded that the mortgage loan officers met the other requirements for the administrative exemption, including that they exercise discretion and independent judgment with respect to matters of significance. App. 83a. Again, the Department did not address that requirement in its subsequent administrator interpretation and it is not at issue in this case.

employees who perform the typical job duties of a mortgage loan officer are administratively exempt under the FLSA—and concluded just the opposite. App. 68a-69a. The typical job duties of mortgage loan officers set forth in the administrator interpretation, however, were the exact same ones the Department relied upon in its 2006 opinion letter reaching the opposite conclusion. Compare App. 50a-51a, with App. 72a-73a.

Specifically, although the Department previously found those same job duties to constitute work "directly related to the management or general business operations of their employer or their employer's customers," App. 75a (quoting 29 C.F.R. § 541.200(a)(2)), and thus qualify for the administrative exemption, the Department now declared that those same job duties "do not relate to the internal management or general business operations of the company." *Id.* at 64a. The Department rejected what it called an "inappropriately narrow definition of sales" in the 2006 opinion, *id.* at 59a-60a n.3, and criticized what it now viewed as that opinion's "misleading assumption and selective and narrow analysis." *Id.* at 68a.

Further, in a 2010 *amicus* brief, the Department acknowledged that its recent administrator interpretation was not "merely a clarification of a regulation." Br. of *Amicus* The Department of Labor at 27, *Henry* v. *Quicken Loans, Inc.*, No. 2:04-cv-40346-SJM-MJH (E.D. Mich. Dec. 9, 2010), ECF No. 609. Rather:

> [The administrator interpretation] unambiguously represents a substantive change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.

Id. at 27-28. That "substantive change," in the Department's own words, "is entitled to controlling deference" under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). *Id.* at 14.

5. Respondent filed a complaint in the district court alleging that the Department violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, in issuing the 2010 administrator interpretation. App. 13a.

As relevant here, respondent's complaint relied upon the D.C. Circuit's tandem of decisions in *Paralyzed Veterans* and *Alaska Professional Hunters*, which together stand for the proposition that where, as here, "an agency has given its regulations a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Professional Hunters*, 177 F.3d at 1034.

The parties filed cross-motions for summary judgment. After briefing closed, three former mortgage loan officers who had sued their previous employer for overtime pay after the Department withdrew the 2006 interpretive opinion moved to intervene in this case. The district court granted the

motion, and the private-party intervenors filed their own summary-judgment brief.[4]

The district court granted summary judgment to petitioners, ruling (as pertinent here) that respondent could not rely upon *Paralyzed Veterans* because respondent could not "satisfy the reliance component of the *Paralyzed Veterans* doctrine." App. 41a-42a. In reaching that conclusion, the district court rejected respondent's argument that its members had relied heavily upon the 2006 opinion letter—and, indeed, that many of respondent's members were sued shortly after the Department withdrew that letter and came to the opposite conclusion in the 2010 administrator interpretation (just as the private-party intervenors in this case had done).

6. The D.C. Circuit reversed. Writing for a unanimous panel (Tatel, J., Brown, J., and Sentelle, S.J.), Judge Brown began by articulating the "straightforward rule" announced by the "tandem" of *Paralyzed Veterans* and *Alaska Hunters*: "'When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.'" App. 2a (quoting *Alaska Hunters*, 177

[4] Private-party intervenor Henry's overtime claim was rejected by a jury in March 2011, and that verdict was affirmed by the Sixth Circuit in 2012. *Henry* v. *Quicken Loans, Inc.*, 698 F.3d 897, 902 (6th Cir. 2012). Henry's remaining interest in this litigation—and thus his standing before this Court—is unclear.

F.3d at 1034) (alteration in original). Noting that the sole issue before the court—whether reliance is "a 'separate and independent requirement'" of the *Paralyzed Veterans* doctrine—was a "narrow one," the D.C. Circuit agreed with respondent that reliance is "just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive." *Ibid.*

Because the government had already "conceded the existence of two definitive—and conflicting—agency interpretations," and "acknowledged at oral argument" that respondent would prevail if "the only reason [courts] look to reliance is to find out if there is a definitive interpretation," App. 3a (citation and internal quotation marks omitted, alteration in original), the D.C. Circuit reversed and remanded with instructions to vacate the 2010 administrator interpretation. *Ibid.* In doing so, the panel made clear that if the Department "wishes to readopt the later-in-time interpretation, it is free to do so. We take no position on the merits of their interpretation. [The Department] must, however, conduct the required notice and comment rulemaking." *Ibid.*

The court noted that "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." App. 6a n.4 (citing government's brief "counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions"). Indeed, the court reasoned, "*Paralyzed Veterans* may very

well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

7. The private-party intervenors (but not the government) filed a petition for rehearing *en banc*. App. 85a. The D.C. Circuit denied the petition, noting that no member of the court called for a vote on the petition. *Id.* at 85a-86a. On remand, the district court issued an order vacating the 2010 administrator interpretation.

REASONS FOR DENYING THE PETITIONS

I. Serious Mootness Concerns Would Likely Prevent This Court From Reaching And Resolving The Question Presented

Executive action taken after the petitions were filed raises serious mootness concerns with respect to the petitions. As noted above, the President directed the Secretary of Labor to "propose revisions to modernize and streamline the existing overtime regulations." Presidential Memorandum, Updating & Modernizing Overtime Regulations, 79 Fed. Reg. 15,209, 15,211 (Mar. 18, 2014). Every indication is that the Secretary will include in the "proposed revisions" the Department's 2010 interpretation at issue in this case—just as the D.C. Circuit invited the Department to do. App. 3a ("If the Department of Labor * * * wishes to readopt the later-in-time interpretation, it is free to."). Indeed, White House officials told

reporters in advance of the President's directive that "loan officers" are among those who will be affected by the new rulemaking. Michael D. Shear & Steven Greenhouse, *Obama Will Seek Broad Expansion of Overtime Pay*, N.Y. TIMES, Mar. 11, 2014, www.nytimes.com/2014/03/12/us/politics/obama-will-seek-broad-expansion-of-overtime-pay.html?_r=0.

The underlying issue in this case is the application of the FLSA with respect to loan officers. Adoption of a new regulation to that end—through notice and comment rulemaking—obviates the need for the Department of Labor to defend its 2010 administrator interpretation. At the very least, there is a serious concern that the new rulemaking will moot the issue of the validity of the Department's 2010 administrator interpretation on the same subject. That alone militates strongly against this Court's review at this time. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 505 (9th ed. 2007) (noting that potential agency action on the underlying issue may prevent certiorari). At best, this Court would be left with two private-party intervenors challenging a rarely used D.C. Circuit doctrine that, for the reasons stated below, does not present a certworthy question.

II. The Asserted Circuit Split Is More Theoretical Than Real

Contrary to petitioners' claims, *Paralyzed Veterans* has not caused any deep rift among the circuits. "Despite its age, few cases discuss *Paralyzed Veterans*

at length," App. 6a, and the only cases that do so were decided on other grounds. See, e.g., *United States* v. *Magnesium Corp. of Am.*, 616 F.3d 1129, 1140 (10th Cir. 2010) (Gorsuch, J.) ("[W]e have no need to wade into such deep waters to decide the appeal before us."); *Warshauer* v. *Solis*, 577 F.3d 1330, 1339 (11th Cir. 2009) ("We need not (and do not) take sides in this debate.").

Petitioners' best evidence of a split is *dicta*—the Seventh Circuit's assertion that *Paralyzed Veterans* "conflicts with the APA's rulemaking provisions, which exempt all interpretive rules from notice and comment, and with our own precedent." *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (Castillo, D.J., sitting by designation). There was no occasion for the Seventh Circuit to decide the question in that case, however, because no interpretation of an agency regulation was involved, *id.* at 556, and because the challenged agency position "did not constitute a departure from a previous position." *Id.* at 558. Thus, *Paralyzed Veterans* by its own terms did not apply, and the D.C. Circuit would not have required notice and comment either. The Seventh Circuit's decision in *Abraham Lincoln Memorial* thus does not evidence a clean split—much less an "intractable" one requiring this Court's resolution.

As the Eleventh Circuit has correctly observed, while "some tension exists" among the circuits, the cases generally "have the potential to be distinguished on their facts." *Warshauer*, 577 F.3d at 1338-39 & n.4. That is likely why the parties here

characterize the split so differently—with the private-party intervenors alleging a 5-4 split, the government claiming a 2-2 split, and *amici* asserting a 2-6 split. Careful inspection of the petitions' cited cases confirms the conclusion that the split is largely illusory. Indeed, the cases cited as conflicting with *Paralyzed Veterans* likely would have come out the same way had they been decided by the D.C. Circuit.[5]

That is because the cases cited by petitioners as evidence of a split were mostly decided on the grounds that the prior agency interpretation was either not substantially different than the later interpretation, or not definitive in the first place, so that one or more of the prerequisites to triggering notice and comment under *Paralyzed Veterans* was lacking. See, e.g., *Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 557; *Miller* v. *Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008); *Erringer* v. *Thompson*, 371 F.3d 625, 630 (9th Cir. 2004); *St. Francis Health Care Ctr.* v. *Shalala*, 205 F.3d 937, 947 (6th Cir. 2000); *Warder* v. *Shalala*, 149 F.3d 73, 82 (1st Cir. 1998);

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[5] The D.C. Circuit's opinion in this case acknowledged the asserted split(s) but also recognized the lack of clarity. App. 5a-6a n.3 (noting that the Eleventh Circuit has identified a potential 6-2 split while the Tenth Circuit has described "a slightly different" 2-4 split) (citing *Magnesium Corp.*, 616 F.3d at 1139). As Judge Gorsuch wrote for the Tenth Circuit, "the Third, Fifth, and Sixth Circuits *apparently* adopt[ ] the D.C. Circuit's view and the First and Ninth Circuits *seemingly* tak[e] the contrary position." *Magnesium Corp.*, 616 F.3d at 1139 (emphases added).

Chief Probation Officers of Cal. v. *Shalala*, 118 F.3d 1327, 1337 (9th Cir. 1997); *Chai* v. *Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995). Practically none of the cases petitioners cite as conflicting with *Paralyzed Veterans* even mentions the doctrine, because it is typically not the issue. Petitioners' cited cases thus do not involve true agency "flip-flopping" that would even implicate *Paralyzed Veterans*.[6]

For example, in *Warder*, 149 F.3d at 79-82, the First Circuit did not require notice and comment on a revised interpretation of a Medicare regulation where the court "very much doubt[ed]" that the revised interpretation "added something new to [the agency's] policies." *Id.* at 82. Without a significant revision to the agency's rules, the same result would have obtained in the D.C. Circuit under *Paralyzed Veterans*.[7]

The same thing is true of *Chief Probation Officers of California*, 118 F.3d at 1327 (White, Ret. J., sitting by designation). The Ninth Circuit held in that case

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[6] The private-party intervenors' question presented bears scant resemblance to *Paralyzed Veterans*. No court has held that agencies "are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking." See Nickols Pet. i.

[7] The same result would also have obtained in the Fifth Circuit, which has expressly approved *Paralyzed Veterans*. See *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). Like the D.C. Circuit, the Fifth Circuit holds that the APA requires an agency to engage in notice and comment only "before *substantially altering* a *well established* regulatory interpretation." *Ibid.* (emphases added).

that notice and comment were not required because there was no substantial change in the agency's interpretation—and went on to explain that interpretive rule changes sometimes require notice and comment when they modify other rules "having the force of law." *Id.* at 1333 n.6. That result is entirely consistent with *Paralyzed Veterans.*[8]

Similarly, in *St. Francis Health Care*, 205 F.3d at 947, the Sixth Circuit held that the agency's new interpretation did not require notice and comment—but that does not mean that the Sixth Circuit is implacably hostile to *Paralyzed Veterans*. The Sixth Circuit itself implicitly recognized as much in *Dismas Charities, Inc.* v. *U.S. Department of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), which expressly rejected the argument that the court's decision in *St. Francis Health Care* precluded notice and comment for *all* interpretive rules. As the Sixth Circuit put it, "once an agency gives a regulation an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed." *Ibid.*

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[8] Another Ninth Circuit case relied upon by petitioners, *Erringer*, 371 F.3d at 625, further demonstrates the absence of a clean conflict. *Erringer* involved agency interpretations of provisions in a Medicare manual, and the Ninth Circuit held that the subsequent interpretations were consistent with a prior rule having the force of law (making them interpretive rules). *Id.* at 632. The court noted: "*Any* rule that *effectively* amends a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking." *Ibid.* (emphases added). That is the same proposition for which *Paralyzed Veterans* stands.

Again, that is entirely consistent with *Paralyzed Veterans*.[9]

Other cases cited by petitioners do not conflict with *Paralyzed Veterans* because the agency's previous interpretation lacked the definitiveness required by *Paralyzed Veterans* to trigger notice and comment. Thus in *California Speedway*, 536 F.3d at 1020, the Ninth Circuit did not require notice and comment where the agency had not bound itself to a prior definitive interpretation of the regulation at issue. *Id.* at 1031-32. That result creates no meaningful conflict with *Paralyzed Veterans*, which requires that the agency's interpretation be sufficiently definitive before any change in that interpretation must be the product of notice and comment rulemaking.[10]

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[9] So too with the Third Circuit's decision in *SBC Inc.* v. *FCC*, 414 F.3d 486 (3d Cir. 2005). While the Third Circuit acknowledged that "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA," *id.* at 498, the court emphasized that the order at issue "did not modify or substantively change the FCC's prior interpretation of the regulation." *Id.* at 501. Thus, the APA's notice and comment requirements did not apply, nor would they have in the D.C. Circuit under *Paralyzed Veterans*.

[10] As evidence of a conflict, petitioners rely upon an alternative rationale in *California Speedway* that assumed the "interpretation constituted a change in [its] understanding of [the regulation]." *Id.* at 1033. But at best that alternative holding is little more than a theoretical disagreement with *Paralyzed Veterans*, given the Ninth Circuit's agreement with the D.C. Circuit's resolution of the "precise question" before it. *Id.* at 1024

(Continued on following page)

In sum, the split identified by petitioners is more theoretical than real. The courts of appeals are not sharply divided over *Paralyzed Veterans* (much less "intractably divided," Nickols Pet. 14), and this Court's review is therefore unwarranted.

III. The Question Presented Arises Infrequently And Has Limited Practical Importance

As the D.C. Circuit recognized in its opinion, App. 6a, the question presented does not occur very often—much less "perpetually." Nickols Pet. 32. Thus its practical importance is decidedly limited because very rarely has *Paralyzed Veterans* led to judicial invalidation of agency action—as even petitioners' *amici* forthrightly acknowledge. *Amicus* Br. of Administrative Law Scholars 8 (noting that "[b]etween 1997 and 2013, the D.C. Circuit applied the dictum in *Paralyzed Veterans* sporadically"). This Court's review is unwarranted for that reason, too.

Indeed, by the government's own count in its briefing below, there are at most two other cases in which the D.C. Circuit has invalidated an agency's interpretive rule for lack of notice and comment: *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005), and *Alaska Professional Hunters*, 177 F.3d at 1030. Given that track record, it is hard to see how *Paralyzed Veterans* "can present a

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("We agree with the D.C. Circuit and reverse the judgment of the district court.").

formidable *in terrorem* barrier for agencies." USG Pet. 20. And although the private-party intervenors speculate (at 33) that *Paralyzed Veterans* will lead agencies to "behave entirely differently," they offer nothing to suggest that has actually been the case in the nearly 20 years since Judge Silberman issued his opinion for the D.C. Circuit in *Paralyzed Veterans*. To the extent the doctrine has had the salutary effect of providing an incentive to agencies to engage in notice and comment before issuing interpretations that contradict their prior interpretations, as Judge Brown noted in her opinion for the D.C. Circuit, App. 6a n.4, that is hardly cause for concern.

Nonetheless, the government worries about the application of *Paralyzed Veterans* to the Medicare program, arguing that given the complexity of that program, the Department of Health and Human Services "should be free to revisit its interpretations expeditiously." USG Pet. 21. Yet the D.C. Circuit's sole application of *Paralyzed Veterans* in the context of that program reveals no cause for concern, as the court actually rebuffed an attempt to use *Paralyzed Veterans* to set aside a Medicare interpretation. *Monmouth Med. Ctr.* v. *Thompson*, 257 F.3d 807, 814 (D.C. Cir. 2001).

And in a district court case—which involved the Secretary's decision to apply a new cost formula retroactively to bar a non-profit medical center from seeking reimbursement for $2.4 million in services it had already rendered in prior years—the Secretary did not appeal the district court's remand of the

Secretary's decision based on *Paralyzed Veterans. Montefiore Med. Ctr.* v. *Leavitt*, 578 F. Supp. 2d 129, 133 (D.D.C. 2008). The occasional invocation of *Paralyzed Veterans* in connection with the Medicare program—apparently only twice in nearly two decades—scarcely hampers the Department's ability to administer that program.

There is simply no need for this Court to review a doctrine so sparingly applied, even if the circuits were deeply divided on the question, which they are not.

IV. *Paralyzed Veterans* Is Correct And Consistent With This Court's Decision In *Vermont Yankee*

The government argues that *Paralyzed Veterans* "disregarded" this Court's teaching in *Vermont Yankee* that § 553 of the APA "specifies the 'maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking' proceedings." USG Pet. 16 (quoting *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). But *Paralyzed Veterans* does no such thing. It does not impose any extrinsic procedures of its own. It simply safeguards the "procedural requirements" that are at the heart of § 553: notice and opportunity for public comment.

As Judge Silberman explained in his opinion for the D.C. Circuit in *Paralyzed Veterans*:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with * * * existing regulations."

117 F.3d at 586 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)) (alterations in original).

Similarly, in *Alaska Professional Hunters*, Judge Randolph's opinion for the D.C. Circuit elaborated on the rationale underlying *Paralyzed Veterans*:

> We [in *Paralyzed Veterans*] explained why an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute. "Rule making," as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule. 5 U.S.C. § 551(5). *See Paralyzed Veterans*, 117 F.3d at 586. When an agency has given its regulation a

> definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.

177 F.3d at 1034.[11]

And so an agency abrogating its own authoritative interpretation of a regulation "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing new procedural requirements not found in the APA, *Paralyzed Veterans* correctly insures that agencies comply with the APA, thereby keeping faith with *Vermont Yankee*.

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[11] The D.C. Circuit restated its explanation in *Syncor International Corp.* v. *Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997):

> We should note, in order to be complete (although this variation is not implicated in the case before us), that an interpretative rule can construe an agency's substantive regulation as well as a statute. *See Paralyzed Veterans*, 117 F.3d at 586; *American Mining Congress* [v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1107-08 (D.C. Cir. 1993)]. In that event, the interpretative rule is, in a sense, even more binding on the agency because its modification, unlike a modification of an interpretative rule construing a statute, will likely require a notice and comment procedure. Otherwise, the agency could evade its notice and comment obligation by "modifying" a substantive rule that was promulgated by notice and comment rulemaking. *See Paralyzed Veterans*, 117 F.3d at 586.

Paralyzed Veterans is therefore consistent with this Court's cases, and correct besides.[12]

Charges that the *Paralyzed Veterans* doctrine limits needed agency flexibility in a manner inconsistent with this Court's decisions are thus overblown—particularly given two inherent limitations of the doctrine. First, if the previous agency determination was not definitive, *Paralyzed Veterans* will not apply. *Ass'n of Am. R.R.s* v. *Dep't of Transp.*, 198 F.3d 944, 948 (D.C. Cir. 1999). Second, if there is no "significant[ ] revis[ion]" to the rule in question, *Paralyzed Veterans* will not apply. *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 58 (D.C. Cir. 2002). Those two

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[12] It is true enough, as petitioners' *amici* point out (at 9), that the D.C. Circuit's *Paralyzed Veterans* doctrine has not been popular in the legal academy. But *amici*'s claim that "[a]ll scholars * * * have reacted critically to the *Paralyzed Veterans* doctrine" is overblown. See, e.g., *Magnesium Corp.*, 616 F.3d at 1140 (Gorsuch, J.) (articulating academic criticisms of the doctrine and then pointing out that "[o]ther scholars take a different view" (citing Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 923 (2006))); see also Ryan DeMotte, *Note & Comment, Interpretative Rulemaking & the* Alaska Hunters *Doctrine: A Necessary Limitation on Agency Discretion*, 66 U. PITT. L. REV. 357, 373-74 (2005) (approving of *Paralyzed Veterans* and arguing that academic criticisms of the doctrine are "largely overstated").

In all events, as Judge Gorsuch correctly pointed out, "[t]he academic debate also proceeds beyond the legal realm we inhabit to the policy realm usually reserved for others, contending variously that [*Paralyzed Veterans*] does and does not promote sound policy." *Magnesium Corp.*, 616 F.3d at 1140 n.12. Those contentions, of course, should be directed at the legislature, not the courts.

limitations simply prevent capricious agency flip-flopping on established positions. They do not create insurmountable hurdles for run-of-the-mill course corrections in administration. If an issue is significant enough to warrant wholesale changes to the actual substance of a rule, it is significant enough to be considered through APA procedures. That was the point of the Act, and there is no conflict between *Paralyzed Veterans* and *Vermont Yankee* on this score.

V. This Case Is A Poor Vehicle

Even if the question presented warranted this Court's review, this case is a poor vehicle and the petitions should be denied for that reason alone.

The highly unusual facts of this case do not lend themselves to broad review of the *Paralyzed Veterans* doctrine as a general matter. The record does not reveal why the Department completely reversed course without notice or an opportunity for public comment. Additionally, no exigent circumstances have been cited that might have explained the Department's action. Indeed, had there been some exigency, the Department could have invoked the APA's "good cause" exception to the notice and comment requirements, 5 U.S.C. § 553(b)(3)(B), and this litigation could have been entirely avoided.

The Department cited no change in the statute or the regulations. Nor did the Department cite any change in the mortgage banking industry—or in

the job duties of loan officers. Instead, the Department (under a new administration) simply considered the same question a second time and reached a completely different outcome—without any warning. Thankfully, such extreme (and unexplained) agency flip-flopping is rare. And for good reason:

> Changes in course * * * cannot be solely a matter of political winds and currents. The Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow.

N.C. Growers' Ass'n, Inc. v. *UFW*, 703 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring).

At the end of the day, if petitioners are right that the question presented is "perpetually recurring," then it will arise again soon enough in a better vehicle for this Court's review—and there is no reason to think future cases will evade review. The highly unusual circumstances here, however, and the serious mootness concerns make this case a poor vehicle for exploring the contours of an agency's right to change its mind.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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REPLY BRIEF

RECORD
AND
BRIEFS

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No. 13-1041

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

Ball Mem'l Hosp. v. *Leavitt*, No. 04-2254, 2006 WL 2714920 (D.D.C. 2006) 9

Cresote Council v. *Johnson*, 555 F. Supp. 2d 36 (D.D.C. 2008) 9

Iyengar v. *Barnhart*, 233 F. Supp. 2d 5 (D.D.C. 2002) 10

Miller v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), cert. denied, 555 U.S. 1208 (2009) 6, 7

Montefiore Med. Ctr. v. *Leavitt*, 578 F. Supp. 2d 129 (D.D.C. 2008) 9

Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998) 1

Swigart v. *Fifth Third Bank.*, 870 F. Supp. 2d 500 (S.D. Ohio 2012) 5

Torch Operating Co. v. *Babbitt*, 172 F. Supp. 2d 113 (D.D.C. 2001) 10

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 8, 10

United States v. *Title Ins. & Trust Co.*, 265 U.S. 472 (1924) 7

Warder v. *Shalala*, 149 F.3d 73 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999) 6, 7

Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) 7

Statutes, regulation and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:

5 U.S.C. 551(5) 1

5 U.S.C. 553(b)(A) 1

29 U.S.C. 259(a) 5

29 C.F.R. 541.600(a) 4

Rule—Continued: Page

Sup. Ct. R. 15.2 3

Miscellaneous:

79 Fed. Reg. 22,122 (Apr. 20, 2014) 5

Presidential Memorandum, *Updating and Modernizing Overtime Regulations*, 79 Fed. Reg. 15,211 (Mar. 13, 2014) 3

Office of the Press Secretary, The White House, *Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr 3

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Congress has expressly and unqualifiedly exempted the amendment and repeal of "interpretative rules" from the rulemaking requirements of the Administrative Procedure Act (APA). 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). The D.C. Circuit nonetheless holds, in conflict with other courts of appeals, that APA notice-and-comment rulemaking is required to amend an interpretive rule that interprets a substantive regulation whenever the interpretive change significantly alters the agency's previously definitive reading of the regulation. Pet. App. 2a, 5a (following *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998)); see Pet. 16-19. The D.C. Circuit has extended its *Paralyzed Veterans* doctrine to agency adjudicative interpretations, Pet. 15, and even to suits in which no one is shown to have relied on the agency's previous con-

struction. Pet. 8, 10. Review is warranted to correct the D.C. Circuit's fundamentally mistaken approach to this important and recurring question of administrative law.

The D.C. Circuit's holding cannot be squared with the APA's unambiguous text and this Court's precedents. Pet. 11-15. Indeed, respondent Mortgage Bankers Association (MBA) makes no attempt to grapple with that text. Br. in Opp. (Br.) 21-25. MBA instead seeks to avoid review by identifying (Br. 12-13) purported mootness "concerns"; asserting (Br. 13-19) the relevant division of authority to be "largely illusory"; and arguing (Br. 19-21) that the question of administrative law presented here is of "limited" practical importance. None of those contentions withstands scrutiny or warrants a denial of review.

1. MBA's avoidance of the statutory text is telling. See Br. 21-25; cf. Pet. 2-3, 10-14. Rather than attempt to explain whether the D.C. Circuit's position can be reconciled with the APA's text, MBA simply reiterates (Br. 22-23) the D.C. Circuit's view that an agency amendment of an existing interpretive rule that significantly changes the agency's interpretation of a substantive regulation should be "regarded" as amending the substantive regulation. But agency interpretations no more "amend" substantive regulations than judicial interpretations "amend" the statutes being interpreted. And here, Congress has expressly exempted such agency "interpretative rules" from notice-and-comment rulemaking.

MBA argues (Br. 25) that the *Paralyzed Veterans* doctrine "simply prevent[s] capricious agency flip-flopping on established positions." But this suit disproves that contention. MBA has not challenged the

district court's holdings that (a) the government's (fully explained) interpretive change was neither arbitrary nor capricious, and that (b) the underlying substantive regulations make it "clear" that the agency's revised interpretation corrected an error in its earlier reading. Pet. 7-8. MBA's brief in opposition likewise fails to dispute those substantive holdings. Accordingly, as this case comes to this Court, it cleanly presents the important question whether an agency interpretative change that is itself substantively valid and reasonable is nonetheless *procedurally* defective because it was issued without notice-and-comment rulemaking. See Sup. Ct. R. 15.2.

2. MBA's multiple non-merits-based reasons for opposing review are without merit.

a. MBA first asserts (Br. 12-13) that, if this Court grants review, it would "likely" be prevented from resolving the question presented because future agency rulemaking could raise mootness concerns. That speculative assertion is unavailing.

After the government filed its certiorari petition, the President noted that some regulations addressing exemptions from the overtime provisions of the Fair Labor Standards Act (FLSA) had become "outdated." Presidential Memorandum, *Updating and Modernizing Overtime Regulations*, 79 Fed. Reg. 15,211 (Mar. 13, 2014). The President further directed the Secretary of Labor to propose revisions to "modernize and streamline" such regulations. *Ibid.* The White House Press Office noted that although the FLSA "appl[ies] broadly to private-sector workers," workers who perform certain duties are exempt from the Act's overtime protections if they earn more than a salary "threshold" set by regulation. Office of the Press Sec-

retary, White House, *Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr. That threshold, the Press Office explained, has "failed to keep up with inflation" and has thus rendered many workers exempt from the Act's protections. *Ibid.*

Petitioner cites (Br. 12) a newspaper article suggesting that regulatory revisions might require overtime pay for many types of workers, including "loan officers." But if the Secretary were to update and increase the salary threshold in 29 C.F.R. 541.600(a), workers who earn less than the increased threshold would be placed in the category of non-exempt employees protected by the FLSA's overtime requirements, even if their job duties would otherwise render them exempt. See *ibid.* Such a regulatory change would have no effect on this case.

The Department of Labor (Department) has informed this Office that there has been no determination at this early stage of the rulemaking process that the Department will propose a regulatory revision that might reinstate the agency's specific mortgage-loan-officer interpretation that the D.C. Circuit has vacated in this case. But even if future regulations would address that specific mortgage-loan-officer issue, MBA provides no basis for concluding that this Court would be frustrated in its ability to resolve the important APA question that the certiorari petition presents. Because the Department is still identifying potential regulatory changes, it has yet to issue a notice of proposed rulemaking (NPRM) in response to the President's directive. And once such notice is

given, the time necessary to produce a final rule is normally quite long. The last significant proposed revision to the FLSA's overtime regulations prompted over 75,000 comments and led to a final rule that took more than a year after the NPRM to publish. See 69 Fed. Reg. 22,122 (Apr. 20, 2004). MBA identifies no basis to conclude that a final rule revising the FLSA's overtime regulations will likely be completed by July 2015, by which time the Court presumably will have rendered its decisions for the October 2014 Term.

Even if the Secretary of Labor were to adopt specific mortgage-loan-officer regulations before this Court could resolve this case, such regulations would not moot MBA's challenge to the Department's 2010 interpretation of the present overtime regulations. "[M]any of MBA's members" have been sued by mortgage-loan officers seeking overtime compensation under the FLSA. Compl. ¶ 34. Such members have been able to invoke the Portal-to-Portal Act's defense against FLSA liability (29 U.S.C. 259(a)) in light of an earlier 2006 interpretation (Pet. App. 70a-84a) in which the Department concluded that the regulations exempt typical mortgage-loan officers from the Act's overtime requirements. See, *e.g.*, *Swigart* v. *Fifth Third Bank*, 870 F. Supp. 2d 500, 509-512 (S.D. Ohio 2012) (jury trial not yet scheduled). The 2010 interpretation, however, both rejected as flawed and "withdr[ew]" the 2006 interpretation, Pet. App. 67a-69a, thus effectively eliminating the Portal-to-Portal Act defense for compensation earned after that 2010 withdrawal. As a result, the 2010 interpretation will remain important to claims for overtime earned between the date of that interpretation and the effective date of any future regulation governing overtime pay

for mortgage-loan officers. MBA thus would appear to retain a sufficient continuing interest, on behalf of its members, in vacating the 2010 interpretation to sustain an ongoing case or controversy. Accordingly, MBA's mootness concerns are misplaced.

b. MBA argues (Br. 13-19) that this Court's review is unwarranted because the 2-2 division of authority identified by the government is "largely illusory," Br. 15. MBA bases that view on its assertion (*ibid.*) that the courts of appeals whose decisions conflict with the D.C. Circuit's *Paralyzed Veterans* doctrine rendered their decisions in cases that themselves "would have come out the same way had they been decided by the D.C. Circuit," *ibid.* Those contentions are fundamentally mistaken for at least two reasons.

First, *this* case is the vehicle in which the government is seeking review by this Court. The relevant question is whether this case would have been decided the same way by the courts of appeals on the other side of the circuit split. The answer is no because the First and Ninth Circuits have issued decisions with holdings that squarely reject the analysis espoused by the D.C. Circuit. See Pet. 17-18. MBA does not suggest otherwise.

MBA instead focuses (Br. 16, 18) on the alternative grounds for upholding the particular interpretive rules in *Miller* v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), cert. denied, 555 U.S. 1208 (2009), and *Warder* v. *Shalala*, 149 F.3d 73 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999). As MBA notes (Br. 16, 18), the *Miller* and *Warder* courts both indicated that the interpretive rules before them had not altered prior agency interpretations of agency regulations. Even in the D.C. Circuit, such interpretive rules can

be issued without notice-and-comment rulemaking. But as the government's petition explains (Pet. 17-18), both *Miller* and *Warder* further held that, even if the defendant agencies had changed their prior reading of their regulations as the *Miller* and *Warder* plaintiffs had argued, the APA entitled the agencies to change their interpretive rules without notice-and-comment rulemaking. See *Miller*, 536 F.3d at 1033; *Warder*, 149 F.3d at 79, 81.

The fact that *Miller* and *Warder* rest on alternative holdings does not diminish their conflict with the D.C. Circuit's jurisprudence. It is settled that, "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Each independent holding in *Miller* and *Warder* thus "is the judgment of the court, and of equal validity with the other." *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 485 (1924) (citation omitted). Accordingly, the First Circuit's and Ninth Circuit's decisions are in conflict with the D.C. Circuit's *Paralyzed Veterans* doctrine because they hold that the APA entitles an agency to alter its own interpretive rule to change its interpretation of a substantive agency regulation without using notice-and-comment rulemaking.

Second, even if the division in the courts of appeals were not significant in itself, this Court's review would be warranted because the D.C. Circuit has erroneously construed the APA in its *Paralyzed Veterans* doctrine. As the petition explains (Pet. 20), venue lies in the District of Columbia over APA actions brought against most federal agencies. For that reason, plaintiffs like MBA are entitled to bring suit in the District of Columbia, where the *Paralyzed Veterans* doctrine

is binding precedent. Those factors render the D.C. Circuit's precedent particularly significant in this context and, correspondingly, can be expected to impede the development of the issue in other courts of appeals. Review therefore is warranted for this Court to correct the D.C. Circuit's atextual narrowing of the APA and the Act's express statutory exemption for "interpretative rules." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978) (explaining that the Court granted certiorari to review the D.C. Circuit's judgments "because of our concern that [the D.C. Circuit] had seriously misread or misapplied [the APA's] statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

c. Finally, MBA contends (Br. 19-21) that the basic question of administrative law presented here does not warrant review because it is of "limited" practical importance. MBA bases (Br. 19) that view on its contention that the D.C. Circuit has itself invalidated agency interpretive rules under its *Paralyzed Veterans* doctrine only occasionally. Those contentions are incorrect. The certiorari petition presents a fundamental question of administrative law concerning the proper scope of agencies' notice-and-comment obligations in light of Congress's decision to exempt "interpretative rules" from the APA's notice-and-comment requirements. The *Paralyzed Veterans* doctrine has a significant practical adverse impact on federal agencies, and it has been repeatedly applied as binding D.C. Circuit precedent to invalidate agency interpretative rules issued without notice and comment.

The D.C. Circuit's *Paralyzed Veterans* doctrine imposes a formidable *in terrorem* effect on agencies

desiring to inform the public about the agencies' current views that update and correct prior interpretations of agency regulations. Pet. 20-21. The doctrine also creates a significant disincentive to providing authoritative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking to make future revisions. Such deterrence and incentives flow directly from the D.C. Circuit's governing precedents and contravene Congress's intent in enacting the APA's express exemption from notice-and-comment rulemaking for interpretive rules. See Pet. 12-14. Although MBA opines (Br. 20) that it "hardly [is] cause for concern" to provide "an incentive to agencies to engage in notice and comment" before altering interpretive rules, the APA's exemption for interpretative rules itself shows that this, in fact, was a particular cause for concern for Congress. That exemption reflects a seasoned understanding of the very practical burdens on agency resources that notice-and-comment rulemaking can impose (Pet. 21) and Congress's judgment that limited agency time and resources should not be expended on notice-and-comment procedures simply to inform the public of the agency's own current interpretation of its regulations.

The D.C. Circuit's *Paralyzed Veterans* doctrine, moreover, has been regularly applied by courts to hold agency interpretive rules invalid for want of notice-and-comment rulemaking. See, *e.g.*, *Montefiore Med. Ctr.* v. *Leavitt*, 578 F. Supp. 2d 129, 133-134 (D.D.C. 2008); *Cresote Council* v. *Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008); *Ball Mem'l Hosp.* v. *Leavitt*, Civ. No. 04-2254, 2006 WL 2714920, at *11-

*12 (D.D.C. 2006); *Iyengar* v. *Barnhart*, 233 F. Supp. 2d 5, 14-15 (D.D.C. 2002); *Torch Operating Co.* v. *Babbitt*, 172 F. Supp. 2d 113, 124-128 (D.D.C. 2001). And in this case, in addition to again invalidating an interpretive rule under its *Paralyzed Veterans* doctrine, the D.C. Circuit has further expanded that doctrine by holding that the doctrine demands notice-and-comment rulemaking even if no one has ever relied on the agency's previous interpretation. Pet. 8, 10. The D.C. Circuit's imposition of its "own notions of proper [rulemaking] procedures upon agencies" and its erroneous departure from the APA's unambiguous text on this fundamental and recurring issue of administrative law warrants review by the Court. See *Vermont Yankee*, 435 U.S. at 525.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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AMICUS CURIAE BRIEF

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v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

JEROME NICKOLS, RYAN HENRY AND BEVERLY BUCK

PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION, ET. AL.

On Petitions for Writs of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

AMICUS CURIAE BRIEF OF ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF THE PETITIONS

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QUESTION PRESENTED

Is an agency required to use notice and comment procedures when it changes its interpretation of one of its own rules?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

THE D.C. CIRCUIT, BY HOLDING THAT AN AGENCY MAY NOT CHANGE AN INTERPRETATION OF ITS OWN RULE WITHOUT USING NOTICE AND COMMENT PROCEDURES, HAS CREATED A CONFLICT AMONG THE CIRCUITS, VIOLATED THE ADMINISTRATIVE PROCEDURE ACT, AND VIOLATED THE PRINCIPLE THIS COURT ANNOUNCED IN VERMONT YANKEE 4

CONCLUSION 11

ADDENDUM LIST OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

Cases

Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) 8

American Mining Congress v. Mine Safety and Health Administration, 995 F.2d 1106 (D.C. Cir. 1993) 5, 6

MetWest Inc. v. Secretary of Labor, 560 F.3d 506 (D.C. Cir. 2009) 8

Mortgage Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013) 3, 9, 10

Mortgage Bankers Ass'n v. Solis, 864 F. Supp. 2d 193 (D. D.C. 2012) 2

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 5

Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997) 7, 8, 9

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) 1, 4

Statutes

Administrative Procedure Act, 5 U.S.C. §551(5) 5

Administrative Procedure Act, 5 U.S.C. §553.....1, 4

Fair Labor Standards Act, 29 U.S.C. §§201-213.....2

Agency rules and other administrative actions

69 Fed. Reg. 22122-191 (Apr. 23, 2004), codified at 29 C.F.R. §541.....2

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Miscellaneous

Jeffrey S. Lubbers, American Bar Association Guide to Federal Agency Rulemaking (5th ed. 2012).....9

Richard J. Pierce, Jr., Administrative Law Treatise (5th ed. 2010).....9

INTEREST OF AMICI CURIAE[1]

Amici are 72 law professors who have taught and written about administrative law. They are listed in the Addendum to this brief. They are submitting this brief because they believe that the D.C. Circuit made a serious error when it held that an agency may not change its own interpretation of one of its rules without using the notice and comment procedures described in section 553 of the Administrative Procedure Act (APA). That holding is inconsistent with the APA and the principle announced by this Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), that a court may not require an agency to use procedures beyond those required by statute. The D.C. Circuit's decision creates a conflict among the circuits on an important issue in administrative law. It also deprives agencies of a source of flexibility that Congress incorporated in the APA.

As the D.C. Circuit made clear in the first three paragraphs of its opinion, the issue that concerns amici was the only issue the court decided. Amici take no position on any other issue that has been raised in the underlying proceeding or that might be addressed on remand from this Court's decision.

STATEMENT OF THE CASE

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[1]No person other than the named amici or their counsel authored this brief or provided financial support for it. Timely notice of an intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

Congress enacted the Fair Labor Standards Act (FLSA) in 1938. 29 U.S.C. §§201-213 (2006). The Department of Labor (DOL) is responsible for administering the FLSA. Section 213(a) (1) of FLSA exempts from the FLSA's mandatory overtime requirement "any employee employed in a bona fide executive, administrative, or professional capacity." DOL most recently revised its rules to implement section 213(a) (1) in 2004. 69 Fed. Reg. 22122-191 (Apr. 23, 2004), codified at 29 C.F.R. §541. In 2006, DOL issued an opinion letter in which it announced an interpretation of the 2004 rules. Opinion Letter FLSA2006-31. In 2010, DOL issued an Administrative Interpretation in which it withdrew its 2006 opinion letter and announced a new interpretation of its 2004 rules that is inconsistent with the interpretation it announced in 2006. U.S. Department of Labor, Administrator's Interpretation No. 2010-01.

Respondent Mortgage Bankers Association filed a complaint in the United States District Court for the District of Columbia in which it sought declaratory and injunctive relief based on its argument that the 2010 interpretation of the 2004 rule was invalid. The District Court upheld the validity of the 2010 interpretation. *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193 (D. D.C. 2012). The court held that DOL could issue the 2010 interpretation of the rule without using the notice and comment procedures because the plaintiff had not established that it had acted to its detriment in justifiable reliance on the 2006 interpretation and that the 2010 interpretation was "not inconsistent with the 2004 regulations and is not arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 210.

The Court of Appeals for the District of Columbia Circuit reversed the District Court and held that the 2010 DOL interpretation of the 2004 DOL rule was invalid because DOL did not use notice and comment procedures when it issued a new interpretation of its own rule that changed a prior interpretation of that rule. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013). The court stated that "the only question" presented was whether a person challenging that interpretation must prove that it relied on a prior interpretation in order to trigger a requirement that an agency must use notice and comment procedures when it changed its interpretation of its rule. The court stated that reliance was not required. It held that an agency may not change any interpretation of a rule without engaging in notice and comment rulemaking. *Id.* at 967.

REASONS FOR GRANTING THE WRIT

THE D.C. CIRCUIT, BY HOLDING THAT AN AGENCY MAY NOT CHANGE AN INTERPRETATION OF ITS OWN RULE WITHOUT USING NOTICE AND COMMENT PROCEDURES, HAS CREATED A CONFLICT AMONG THE CIRCUITS, VIOLATED THE ADMINISTRATIVE PROCEDURE ACT, AND VIOLATED THE PRINCIPLE THIS COURT ANNOUNCED IN VERMONT YANKEE .

Until 1997, it was hornbook law in every circuit that an agency may change its interpretation of one of its rules without using notice and comment procedures. That universal understanding was based on section 553 of the Administrative Procedure Act (APA). 5 U.S.C. §553. That section requires agencies to use the notice and comment procedures to issue, amend, or repeal a rule subject to specified exceptions. Section 553(b)(3)(A) provides that: "Except when notice or hearing is required by statute, this subsection does not apply – (A) to interpretative rules . . . ." That universal understanding was also based on this Court's holding in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-47 (1978), that a court may not require an agency to use procedures beyond those required by statute or by the Constitution.

That understanding also followed logically from the reasoning and holding of this Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). In that

opinion, the Court concluded that Congress wanted reviewing courts to apply the same standards to issuance, amendment, and repeal of rules. *Id.* at 41. The APA's definition of "rulemaking" in 5 U.S.C. §551(5) - "agency process for formulating, amending, or repealing a rule" - further supports the conclusion that Congress also wanted agencies to use the same procedures when they issue, amend, or repeal a rule. Thus, if an agency is not required to use the notice and comment procedures to issue a rule because the rule is interpretative, it is not required to use those procedures when it amends or repeals that rule.

The D.C. Circuit's 1993 opinion in *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993), illustrates the way the universal understanding functioned in all circuits before 1997. The Mine Safety and Health Administration (MSHA) issued a rule that required mine owners and operators to report within ten days every case of occupational illness "diagnosed" in an employee. MSHA then found it necessary to interpret the term "diagnosed" as it arose in the context of a chest x-ray that arguably showed that an employee had contracted pneumoconiosis—a disease that is almost always caused by exposure to coal dust.

MSHA decided to define diagnosis with reference to the criteria used by a widely-respected public health organization for purposes of determining whether someone suffers from pneumoconiosis. That organization classified x-rays on a twelve step scale based on the concentration of opacities in the x-ray, and classified x-ray readers on a scale based on the reader's relative skill at reading

x-rays. The agency's first interpretation of the word "diagnosed," as used in its rule, relied on a particular combination of x-ray readings and x-ray readers. After some experience in applying that interpretation, the agency issued a new interpretation that relied on a different combination of x-ray readings and x-ray readers. After some experience in applying that interpretation, the agency adopted a third interpretation that relied on a third combination of x-ray readings and readers. The American Mining Congress (AMC) contended that the third interpretation was invalid because the agency did not use notice and comment rulemaking to issue it.

The D.C. Circuit rejected AMC's argument and upheld MSHA's third interpretation of "diagnosed" as that term was used in MSHA's rule. *Id.* at 1112-13. The court began with the then-universal understanding that the notice and comment procedures are not required to issue, rescind, or amend an interpretative rule. *Id.* at 1108-09. The court announced and applied a four-part test for determining whether a rule is an interpretative rule that is exempt from notice and comment procedure. The fourth part of the test was "whether the rule effectively amends a prior *legislative* rule." *Id.* at 1112 [emphasis added]. Because the court concluded that the third interpretation did not amend a legislative rule, it held that it was an interpretative rule that was exempt from notice and comment even though it obviously amended the prior two interpretative rules. *Id.* at 1112-13.

The pre-1997 universal understanding that an agency may change its interpretation of one of its

rules without engaging in notice and comment rulemaking furthers the interests of a wide range of persons affected by an agency's rules. Agencies receive many requests from regulated firms and from potential beneficiaries of the agency's rules to make public the agency's interpretations of its rules before the agency applies them in a particular case. As long as the universal understanding was in place, agencies usually responded to those requests by making their interpretations public because they knew that they could announce changes in their interpretations based on their experience with their initial interpretation without first having to engage in notice and comment rulemaking. A change in the legal environment that requires an agency to conduct a notice and comment proceeding before it announces a change in its interpretation of one of its rules would discourage agencies from making public their interpretations of their rules until they apply them in a particular case. Such a change in the legal environment would create unnecessary uncertainty for regulated firms and for the general public.

This universal understanding began to break down in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997). There the D.C. Circuit stated that an agency may not change its interpretation of a rule without using notice and comment procedures. *Id.* at 586. The statement was dicta because the court went on to uphold the interpretation at issue based on its conclusion that the new interpretation was not inconsistent with any prior interpretation. *Id.* at 588. Two years later, the D.C. Circuit relied on its dictum in *Paralyzed Veterans* as the basis for a holding that a new interpretation of

a rule was invalid because the new interpretation was inconsistent with an interpretation that the agency had announced and applied for thirty years. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033 (D.C. Cir. 1999) The court held that an agency may not adopt a new interpretation that is inconsistent with a prior interpretation in such a situation without using notice and comment procedures. In subsequent cases, the D.C. Circuit declined to apply the holding in *Alaska Professional Hunters* and distinguished it on the basis that those challenging agencies' changes in interpretations failed to show, as the petitioners in *Alaska Professional Hunters* had, that the challengers had made major changes in their behavior in "substantial and justifiable reliance on a well-established agency interpretation." *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009).

Between 1997 and 2013, the D.C. Circuit applied the dictum in *Paralyzed Veterans* sporadically. It often suggested that the dictum applied only when a petitioner can establish that it took significant actions to its detriment based on justifiable reliance on the agency's prior interpretation of the rule. The episodic and highly contingent pattern of D.C. Circuit opinions caused the author of the American Bar Association's Guide to Federal Agency Rulemaking to conclude in 2012 that the *Paralyzed Veterans* doctrine "may be on the wane" and that it required "some reliance on the settled interpretation by the challenging party." Jeffrey S. Lubbers, American Bar Association Guide to Federal

Agency Rulemaking 77-82 (5th ed. 2012).[2] The D.C. Circuit rejected that widespread view in its opinion in *Mortgage Bankers* by reaffirming the doctrine and denying that it is dependent on a showing that anyone acted in reliance on the prior interpretation.

All scholars and most courts have reacted critically to the *Paralyzed Veterans* doctrine. The American Bar Association Guide to Federal Agency Rulemaking cites some of the many scholarly articles that criticize the doctrine.[3] We are not aware of a single scholar who agrees with the doctrine. Indeed, when counsel for amici circulated a draft of this brief, not a single scholar declined to join it on the ground that the position of the D.C. Circuit below was correct. The Fifth Circuit has also adopted the doctrine, but the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits have rejected it.[4]

The split in the circuits is particularly problematic in this context. Because most federal statutes permit a plaintiff to file an action for declaratory or injunctive relief against a government agency in federal court in the District of Columbia Circuit, it is safe to predict that anyone who dislikes a newly-announced change in an agency interpretation of one of its own rules will follow the lead of the Mortgage Bankers Association and will file a complaint in the District of Columbia, with complete confidence that the plaintiff will prevail

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[2] See also Richard Pierce, I Administrative Law Treatise 454-456 (5th ed. 2010).

[3] See sources cited in American Bar Association Guide to Federal Agency Rulemaking, *supra*, at 78, note 8.

[4] See *Mortgage Bankers Ass'n v. Harris*, 720 F. 3d at 969 note 3.

notwithstanding the contrary views of most circuit courts. That predictable practice will change the legal environment in ways that will discourage agencies from announcing their interpretations of their own rules before they apply those rules if the D.C. Circuit holding in *Mortgage Bankers* is allowed to stand. The *Mortgage Bankers* doctrine will also make it more burdensome, costly, and time-consuming for agencies to change interpretations that they have previously announced, regardless of whether those changes would expand or contract regulatory scope, or strengthen or weaken regulatory substance.

CONCLUSION

Amici urge the Court to grant the petitions in these cases in order to resolve the conflicts among the circuits that now exists with respect to this important question of federal administrative law and to hold that an agency may change an interpretation of one of its own rules without conducting a notice and comment rulemaking proceeding.

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PETITIONER'S BRIEF

Nos. 13-1041 and 13-1052

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

JEROME NICKOLS, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, generally provides that "notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. 553(b), and, if such notice is required, the rulemaking agency must give interested persons an opportunity to submit written comments, 5 U.S.C. 553(c). The APA further provides that its notice-and-comment requirement "does not apply * * * to interpretative rules," unless notice is otherwise required by statute. 5 U.S.C. 553(b)(A). No other statute requires notice in this case. The question presented is:

Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

PARTIES TO THE PROCEEDING

Petitioners in No. 13-1041 are Thomas E. Perez, Secretary of Labor; the Department of Labor; and David Weil, Administrator, Wage and Hour Division, Department of Labor.*

Respondent Mortgage Bankers Association was plaintiff-appellant below.

Respondents Beverly Buck, Ryan Henry, and Jerome Nickols are petitioners in No. 13-1052 and were intervenors-appellees below.

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* David Weil was automatically substituted as a party after he became the Administrator of the Wage and Hour Division in May 2014. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 10
Argument:
An agency may adopt an interpretive rule altering its prior interpretation of an agency regulation without notice-and-comment rulemaking 13
A. The APA categorically exempts interpretive rules from the APA's notice-and-comment requirement 15
B. Congress designed the APA's exemption for interpretive rules to encourage, not obstruct, the public's access to agency interpretations 20
C. The APA specifies the maximum procedural requirements that courts may enforce for agency rulemaking 27
D. MBA's defense of the *Paralyzed Veterans* doctrine is without merit 29
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Alaska Prof'l Hunters Ass'n v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) 7, 9, 10, 14, 29
Allentown Mack Sales & Serv., Inc. v. *NLRB*, 522 U.S. 359 (1998) 32
Brooklyn Sav. Bank v. *O'Neil*, 324 U.S. 697 (1945) 3
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 18, 21, 30
Environmental Integrity Project v. *EPA*, 425 F.3d 992 (D.C. Cir. 2005) 19

Cases—Continued: Page

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 12, 15, 17, 27, 30, 34
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 19
Hoctor v. *United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996) 24
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 18
Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 18
MetWest Inc. v. *Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009) 8
Molycorp, Inc. v. *EPA*, 197 F.3d 543 (D.C. Cir. 1999) 13, 15
Monmouth Med. Ctr. v. *Thompson*, 257 F.3d 807 (D.C. Cir. 2001) 14
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 20
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 18
Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998) 7, 13, 32
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) ..... *passim*
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 19
Transportation Workers Union v. *TSA*, 492 F.3d 471 (D.C. Cir. 2007) 14
Tripoli Rocketry Ass'n v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1 (D.D.C. 2004), remanded, 437 F.3d 75 (D.C. Cir. 2006) 7

Cases—Continued: Page

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) ..... *passim*
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950) 27

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 2
5 U.S.C. 551-559 3
5 U.S.C. 551(4) 2, 11, 16, 20, 30
5 U.S.C. 551(5) ..... *passim*
5 U.S.C. 551(6) 20
5 U.S.C. 551(7) 20
5 U.S.C. 553 (§ 4) ..... *passim*
5 U.S.C. 553(b) (§ 4(b)) 3, 10, 15
5 U.S.C. 553(b)(A) ..... *passim*
5 U.S.C. 553(c) (§ 4(c)) 3, 10, 16
5 U.S.C. 553(e) 23
5 U.S.C. 706(2)(A) 31, 32
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 3
29 U.S.C. 206 3
29 U.S.C. 207 3
29 U.S.C. 213(a)(1) 3, 16
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* 4
29 U.S.C. 259(a) 4
29 U.S.C. 259(b)(1) 4
29 C.F.R.:
Pt. 541 (1998) 4
Pt. 541 4
Section 541.203(b) 4, 5, 8

Regulation—Continued: Page

Section 541.500(b) 6

Miscellaneous:

Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. (1945) 22

3 Fed. Reg. 2518 (Oct. 20, 1938) 4

Final Report of the Attorney General's Committee on Administrative Procedure (1941), reprinted as *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 21

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 22, 23, 26

Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917 (2006) 29

Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000) 19, 25, 26, 33, 34

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S. 7, 79th Cong., 1st Sess. (1945) 22

S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 23, 26

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U.S. Gov't Accountability Office, *GAO-09-205, Federal Rulemaking* (2009) 26

Wage & Hour Div.:

Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8249 (Dep't of Labor May 17, 1999), available at 1999 WL 1002401 5

Miscellaneous—Continued: Page

Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8351 (Dep't of Labor Feb. 16, 2001), available at 2001 WL 1558764 5

In the Supreme Court of the United States

No. 13-1041

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 720 F.3d 966.[1] The opinion of the district court (Pet. App. 13a-48a) is reported at 864 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied

[1] "Pet. App." refers to the petition appendix in No. 13-1041.

on October 2, 2013 (Pet. App. 85a-86a). On December 19 and 20, 2013, the Chief Justice extended the time within which to file petitions for writs of certiorari to and including January 30, 2014. On January 21, 2014, the Chief Justice further extended the time to February 28, 2014, and the petitions were filed on that date. The petitions for writs of certiorari were granted on June 16, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition in No. 13-1041. Pet. App. 87a-99a.

STATEMENT

1. a. This case concerns whether the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, requires a federal agency to follow notice-and-comment rulemaking procedures before it may alter an "interpretive" rule that articulates an interpretation of an agency regulation.

The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). The Act defines "rule" to encompass a broad range of agency "statement[s]" serving various functions, including statements that are "designed to * * * interpret * * * law" as well as statements that are designed "to implement * * * or prescribe law." 5 U.S.C. 551(4). More specifically, the Act defines "rule" to "mean[] the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Ibid.*

Section 4 of the APA, 5 U.S.C. 553, governs the process of agency rulemaking. Section 4(b) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. 553(b). Section 4(c), in turn, provides that, if "notice [is] required by this section," the agency, after giving such notice, "shall give interested persons an opportunity to participate in the rule making through submission of written [comments]" and consider those comments before promulgating the rule. 5 U.S.C. 553(c).

Section 4 further provides, however, that its notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

b. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its minimum-wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [5 U.S.C. 551-559])." 29 U.S.C. 213(a)(1).

Congress contemplated that, in the course of its administration of the FLSA, the Department of Labor (Department) would from time to time modify or re-

scind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1).

The Department has promulgated regulations through notice-and-comment rulemaking that define and delimit the categories of FLSA-exempt employees. See, *e.g.*, 29 C.F.R. Pt. 541 (1998); 3 Fed. Reg. 2518 (Oct. 20, 1938) (original Part 541 regulations). In 2004, the Department revised those regulations through notice-and-comment rulemaking. 29 C.F.R. Pt. 541. The current regulations provide, in pertinent part, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. 541.203(b) (administrative exemption examples).

2. This case involves the Department's interpretation of its FLSA regulations governing the "administrative" exemption from the FSLA's overtime and minimum-wage requirements in the context of mortgage-loan officers. In 1999 and 2001, the Wage and Hour Division issued Opinion Letters in which it interpreted the then-existing regulations and concluded that mortgage-loan officers are not FLSA-exempt

administrative employees, *i.e.*, that the FLSA's minimum-wage and overtime requirements apply to those employees.[2]

After the Department revised its FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA or Association), a national trade association representing real-estate finance companies, requested an opinion from the Wage and Hour Division on whether mortgage-loan officers are FLSA exempt. Pet. App. 3a, 20a n.3. In 2006, the Division's Administrator issued a letter opining that mortgage-loan officers are exempt administrative employees under those regulations. *Id.* at 70a-84a.

In 2010, the Wage and Hour Division revisited the issue and revised its interpretation of the governing regulations in an Administrator's Interpretation. Pet. App. 49a-69a. That Interpretation reanalyzed provisions of the 2004 regulations and considered judicial decisions addressing the administrative exemption. *Id.* at 50a-69a. The Department concluded that "employees who perform the typical job duties of a mortgage loan officer, as described" in the Interpretation, "have a primary duty of making sales for their employers and, therefore, do not qualify" for the exemption for "administrative" employees under the FLSA's implementing regulations. *Id.* at 49a-50a, 52a, 69a. The Department accordingly withdrew its 2006 Opinion Letter, explaining that the letter had adopted an erroneous reading of 29 C.F.R. 541.203(b) and related

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[2] See Wage & Hour Div., Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8351 (Dep't of Labor Feb. 16, 2001), available at 2001 WL 1558764; Wage & Hour Div., Opinion Letter, 6A Lab. Rel. Rep. (BNA) 99:8249 (Dep't of Labor May 17, 1999), available at 1999 WL 1002401.

provisions that was inconsistent with, *inter alia*, a regulation addressing work performed incidental to, and in conjunction with, an employee's own sales or solicitations (29 C.F.R. 541.500(b)). Pet. App. 59a & n.3, 67a-68a. The Department did not utilize notice-and-comment rulemaking to issue its 1999, 2001, and 2006 Opinion Letters or its 2010 Administrator's Interpretation.

3. a. Respondent MBA filed this APA action in district court to vacate and set aside the 2010 Administrator's Interpretation. Pet. App. 13a-14a, 28a. Petitioners Buck, Henry, and Nickols (former mortgage-loan officers) intervened. 2/13/2012 Order 1-2 (Doc. 25).

MBA challenged the 2010 Administrator's Interpretation on two grounds. First, the Association argued that the interpretation was procedurally invalid because the agency must use APA notice-and-comment rulemaking to revise its reading of a regulation in an interpretive rule. Pet. App. 28a. Second, the Association argued that the interpretation was substantively invalid because it was inconsistent with the regulations it interprets and, thus, was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Ibid.* (citation omitted).

The government responded that, as relevant here, the Administrator's Interpretation was an "interpretive" rule and that the APA exempts such "interpretive rules" from notice-and-comment rulemaking. Gov't Cross Mot. to Dismiss 14-15 (Doc. 15) (citing 5 U.S.C. 553(b)(A)); see *id.* at 15 n.8 ("There is no dispute between the parties that the 2010 [Administrator's Interpetation] is an interpretive rule."). MBA acknowledged that the government was "correct" that

the 2010 Administrator's Interpretation was an interpretative rule, but argued that its status as an interpretative rule was "of no moment" because an "'interpretative rule[] * * * still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans* [*of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998),] and its progeny." MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17) (quoting *Tripoli Rocketry Ass'n* v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 12 (D.D.C. 2004), remanded, 437 F.3d 75 (D.C. Cir. 2006)). Under its *Paralyzed Veterans* doctrine, the D.C. Circuit holds that if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation," the resulting "modification of [the agency's earlier] interpretive rule construing [the] agency's substantive regulation" requires notice-and-comment rulemaking. *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).[3]

b. The district court granted summary judgment to the government. Pet. App. 13a-48a. The court agreed with the parties that the "2010 [Administrator's Interpretation] is an interpretive rule," and the court's analysis addressed whether it was valid as such a rule. *Id.* at 31a n.7.

First, the district court concluded that the Department did not have to use notice-and-comment-rulemaking procedures to revise its prior interpretation of its regulations. Pet. App. 32a-44a. The district court explained that the D.C. Circuit's *Paralyzed*

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[3] Although *Paralyzed Veterans* articulated its notice-and-comment requirement in dictum, the D.C. Circuit later elevated that requirement to a holding in *Alaska Professional Hunters*.

Veterans precedents controlled, *id.* at 32a-37a, but concluded that they would require notice-and-comment rulemaking only if the affected party had "substantial[ly] and justifiabl[y] reli[ed] on a [prior] well-established agency interpretation," *id.* at 40a (emphasis omitted) (quoting *MetWest Inc.* v. *Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009)). See *id.* at 37a-41a. The court found that the Association had failed to establish such reliance. *Id.* at 41a-44a. The court stated, *inter alia*, that the Portal-to-Portal Act's defense for good-faith reliance on a prior agency interpretation undermined the Association's argument that notice-and-comment rulemaking was required to protect the reliance interests of its members. *Id.* at 43a-44a.

Second, the district court upheld the Administrator's Interpretation as substantively valid. Pet. App. 44a-47a. The court concluded that the Department's interpretation of its FLSA regulations was "persuasive," finding it "clear" on the face of the regulations that the Association's contrary position was based on a misreading of 29 C.F.R. 541.203(b). Pet. App. 44a, 46a. The court accordingly held that the 2010 interpretation was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 47a.

4. a. On appeal, MBA abandoned its substantive contention that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. See MBA C.A. Br. 1-56; MBA C.A. Reply Br. 1-29. The Association argued only that the 2010 Administrator's Interpretation was procedurally invalid under *Paralyzed Veterans*. MBA C.A. Br. 2, 20-21.

b. The D.C. Circuit reversed and remanded with instructions to vacate the 2010 Administrator's Interpretation. Pet. App. 1a-12a.

The court of appeals explained that, under its *Paralyzed Veterans* decisions, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." Pet. App. 2a (quoting *Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1034) (brackets in original). That conclusion, the court explained, rests on the "operative assumption" that "a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Id.* at 5a n.3.

The court of appeals further concluded that the relevant analysis under *Paralyzed Veterans* "contains just two elements: definitive interpretations ('definitiveness') and a significant change ('significant revision')." Pet. App. 5a. The court of appeals thus rejected the government's argument that the rule of *Paralyzed Veterans* incorporates an element of reliance. *Id.* at 6a-12a. The court held that although reliance can in some contexts be relevant to whether a prior agency interpretation was sufficiently definitive, reliance is not itself a distinct requirement under *Paralyzed Veterans*. *Id.* at 9a.

The court of appeals observed that the government in this case "conceded the existence of two definitive—and conflicting—agency interpretations." Pet. App. 3a. The court accordingly held that, under its *Paralyzed Veterans* jurisprudence, the 2010 Administrator's Interpretation, which significantly revised the

interpretation in the 2006 Opinion Letter, must be vacated. *Ibid.* The court emphasized that it took "no position on the merits of [the 2010] interpretation" and stated that the Department was entitled to "readopt" that interpretation in the future but must first "conduct the required notice and comment rulemaking." *Ibid.*

SUMMARY OF ARGUMENT

The D.C. Circuit's *Paralyzed Veterans* doctrine requires that agencies utilize notice-and-comment rulemaking in order to make a significant "modification [to] an interpretive rule construing an agency's substantive regulation." *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). That judge-made procedural requirement is inconsistent with the text of the APA, the policies embodied in that Act, and this Court's precedents.

A. The APA expressly exempts interpretive rules from the Act's notice-and-comment-rulemaking requirement. Section 4 of the Act generally requires agencies to give notice of, and to afford the public an opportunity to provide written comments on, proposed "rule making." 5 U.S.C. 553(b) and (c). Section 4, however, expressly exempts "interpretative rules" from those requirements, unless another statute requires otherwise. 5 U.S.C. 553(b)(A). And because the APA defines "rule making" to mean the agency process for "formulating, amending, or repealing a rule," 5 U.S.C. 551(5), Congress unambiguously expressed its intent that the formulation, amendment, and repeal of interpretive rules are categorically exempt from the Act's notice-and-comment requirement. That unambiguous command has been long understood by both the Executive Branch and this Court to

mean exactly what it says: agency interpretive rules do not require notice-and-comment rulemaking. See, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (*Guernsey*) ("Interpretive rules do not require notice and comment.").

B. Congress's purpose for exempting interpretive rules from notice-and-comment rulemaking is plain. An "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law," 5 U.S.C. 551(4), "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*, 514 U.S. at 99 (citation omitted). Such interpretive statements reflect an agency's *own* views and, unlike binding legislative rules, they do not have the force and effect of law. Congress thus recognized that it would be an unwarranted encroachment to force federal agencies to dedicate limited time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.

Indeed, Congress designed the APA's interpretive-rule exemption to encourage the promulgation of such rules by giving agencies discretion to decide whether and to what extent public participation is warranted in particular contexts. Congress's purpose of encouraging agencies to inform the public of their understanding of the regulatory programs they administer carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision is, in fact, erroneous. Agencies should be encouraged to announce their changed views promptly and publicly, rather than allow the public to be misled

by an earlier interpretive rule that is contrary to the agency's best understanding of the regulatory scheme.

C. The D.C. Circuit extra-textual requirement of notice-and-comment rulemaking for interpretive rules constitutes a "serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). Indeed, this Court has long made clear that Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking." 435 U.S. at 524. Because Section 4 expressly exempts interpretive rules from the Act's notice-and-comment-rulemaking requirement, the court of appeals "stray[ed] beyond the judicial province" (*id.* at 549) by imposing its own views of appropriate rulemaking procedures on federal agencies.

D. MBA's attempted defense of the *Paralyzed Veterans* doctrine lacks merit. MBA contends, for instance, that an agency's modification of a prior interpretive rule requires notice-and-comment rulemaking because it is effectively an "amendment" of the underlying legislative regulation being construed. But an agency interpretation no more "amends" a legislative regulation than a judicial interpretation "amends" the source of law it interprets. Moreover, the APA "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Section 4's "rule making" provisions apply equally to the pro-

cess of "formulating, amending, [and] repealing" a rule, 5 U.S.C. 551(5), and Section 4's interpretive-rule exemption makes clear that none of those actions with respect to interpretive rules require notice-and-comment rulemaking. The *Paralyzed Veterans* doctrine disregards that rulemaking symmetry by permitting an agency's initial formulation of an interpretive rule to be effectuated without notice-and-comment procedures while requiring notice-and-comment rulemaking to amend or repeal the same interpretive rule.

In short, the court of appeals' *Paralyzed Veterans* doctrine finds no support in the APA's text, that statute's purposes, or this Court's precedents. This Court should therefore reject that doctrine and confirm that Congress meant what it said in the APA: Interpretive rules do not require notice-and-comment rulemaking.

ARGUMENT

AN AGENCY MAY ADOPT AN INTERPRETIVE RULE ALTERING ITS PRIOR INTERPRETATION OF AN AGENCY REGULATION WITHOUT NOTICE-AND-COMMENT RULEMAKING

This case concerns an important question of administrative law: Whether a federal agency is required to conduct notice-and-comment rulemaking before it may correct or significantly revise an interpretive rule that construes a legislative regulation. Under the D.C. Circuit's *Paralyzed Veterans* doctrine, an agency's "interpretative rule construing a legislative rule cannot be modified [significantly] without the notice and comment procedure that would be required to change the underlying regulation." *Molycorp, Inc.* v. *EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999) (citing *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586

(D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998)); see Pet. App. 2a. As a result, the "modification of an interpretive rule construing an agency's substantive regulation will * * * 'likely require a notice and comment procedure,'" *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (citation omitted), because the D.C. Circuit "hold[s] that an agency cannot significantly change its position, * * * even between two interpretive rules, without prior notice and comment [rulemaking]." *Transportation Workers Union* v. *TSA*, 492 F.3d 471, 475 (D.C. Cir. 2007); see also, *e.g.*, *Monmouth Med. Ctr.* v. *Thompson*, 257 F.3d 807, 813-814 (D.C. Cir. 2001) ("[U]nder the law of this circuit altering an interpretive rule (interpreting an agency regulation)" normally "requires notice and opportunity for comment.").

Moreover, in this case, the D.C. Circuit eliminated any need for plaintiffs even to show reliance on the prior regulatory interpretation that an agency seeks to revise. Pet. App. 2a. The *Paralyzed Veterans* doctrine thus now requires an agency to undertake notice-and-comment rulemaking simply to explain to the public that the agency has corrected or revised its previous legal interpretation of a regulation in some significant way—even if no one has ever relied on the prior interpretation.

The court of appeals' *Paralyzed Veterans* doctrine cannot be squared with the unambiguous text of the APA, the policies embodied in that Act, or this Court's governing decisions. The APA's unqualified exemption of "interpretative rules" from the requirement of notice-and-comment rulemaking (unless another statute requires otherwise), 5 U.S.C. 553(b)(A), admits no limitation of the sort imposed by the *Paralyzed Veter-*

ans doctrine. Indeed, Congress exempted interpretive rules from notice-and-comment rulemaking precisely because it wanted to encourage, not discourage, agencies to issue and revise such rules. The D.C. Circuit's creation of an extra-statutory procedural hurdle for interpretive rules not only undermines the flexibility Congress intended the exemption to afford federal agencies; it directly contravenes this Court's admonishment that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 545-549 (1978) (*Vermont Yankee*)). The *Paralyzed Veterans* doctrine has long been criticized by legal scholars as an unjustified departure from the APA that disregards fundamental principles of administrative law. This Court should now lay that misguided doctrine to rest.

A. The APA Categorically Exempts Interpretive Rules From The APA's Notice-And-Comment Requirement

The APA expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). That statutory exemption for interpretive rules forecloses the D.C. Circuit's requirement of notice-and-comment rulemaking when an agency seeks to amend an "interpretative rule construing a legislative rule." *Molycorp, Inc.*, 197 F.3d at 546.

1. Section 4 of the APA generally directs that a "notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. 553(b). If such notice is required, the agency must also give interested per-

sons "an opportunity to participate in the rule making through submission of written [comments]." 5 U.S.C. 553(c). Section 4, however, contains an express exemption for interpretive rules. It specifies that, unless "notice or hearing is required by statute," Section 4's notice-and-comment requirement "does *not* apply * * * to interpretative rules." 5 U.S.C. 553(b)(A) (emphasis added).[4]

The APA's definition of "rule making" demonstrates that this exemption from the Act's notice-and-comment-rulemaking requirement applies not only when an agency formulates an interpretive rule in the first instance, but also when it issues a subsequent interpretive rule that amends or supersedes the first. Because the Act defines "rule making" to be an "agency process for formulating, *amending*, or *repealing* a rule," 5 U.S.C. 551(5) (emphasis added), the statutory provisions in Section 4 that govern "rule making"—including the exemption from notice-and-comment procedures for "interpretive rules"—necessarily apply to any agency process for "formulating, amending, or repealing" (*ibid.*) any "agency statement of general or particular applicability and future effect designed to * * * interpret * * * law," 5 U.S.C. 551(4) (defining "rule"). In other words, the general APA

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[4] No other statute requires notice and comment in this case. The FLSA vests the Secretary of Labor with authority to "define[] and delimit[]" the scope of the minimum-wage and overtime exemption in 29 U.S.C. 213(a)(1) by issuing "regulations * * * subject to the provisions of subchapter II of chapter 5 of title 5," *ibid.*, *i.e.*, subject to the APA's administrative-procedure provisions at 5 U.S.C. 551-559. Congress has thus vested the Secretary of Labor with authority to promulgate legislative rules in this area but has not required notice-and-comment rulemaking for any associated interpretive rules.

requirement of notice-and-comment rulemaking does not apply to any agency process for either (a) "formulating" an interpretive rule or (b) subsequently "amending" or "repealing" such a rule. That express exemption reflects the APA's general approach of "mak[ing] no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515.

2. Since the APA's enactment, the government and the decisions of this Court have understood the unambiguous import of the statute's unqualified exemption for interpretive rules. The D.C. Circuit's imposition of an extra-textual notice-and-comment requirement is inconsistent with both this Court's teachings and the APA's broader design.

In the wake of Congress's passage of the APA, Attorney General Clark issued a manual on the APA to provide guidance to agencies in conforming their procedures to the Act's requirements. That guidance drew on the Department of Justice's expertise obtained from the significant role that it played "in the development of the [APA]." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 5-6 (1947) (*APA Manual*). The Attorney General concluded that the statutory exemption in 5 U.S.C. 553(b)(A) "restricts the application" of the Act's notice-and-comment-rulemaking requirement to legislative rules "issued pursuant to statutory authority," "which implement [a] statute" and "have the force and effect of law." *APA Manual* 30 & n.3. In contrast, the Attorney General concluded, the exemption for "interpretative rules" authorizes an agency to issue "rules or statements * * * to advise the

public of the agency's construction of the statutes and rules which it administers" without recourse to notice-and-comment rulemaking. *Ibid.*[5]

This Court has since repeatedly made clear that "interpretive rule[s]," which inform the public of the "'agency's construction of the statutes and rules which it administers,'" "do not require notice and comment" rulemaking. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979), which in turn quotes the Attorney General's *APA Manual* 30 n.3); see also, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply * * * only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

The *Paralyzed Veterans* doctrine cannot be squared with those teachings. The D.C. Circuit has disregarded not only the APA's unqualified textual exemption for interpretive rules, but also this Court's repeated explanation that interpretive rulemaking does not require notice-and-comment procedures. Indeed, the D.C. Circuit has never attempted to ex-

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[5] This Court has repeatedly found the Attorney General's manual interpreting the APA to be a persuasive construction of the APA. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases); see also, *e.g.*, *Vermont Yankee*, 435 U.S. at 546 (explaining that this Court has given deference to the Attorney General's "contemporaneous interpretation" of the APA in the *APA Manual* "because of the role played by the Department of Justice in drafting the legislation").

plain how its jurisprudence can be reconciled with the APA's interpretive-rule exemption or this Court's decisions.

The D.C. Circuit has likewise ignored the Court's teaching that agencies are free to amend interpretive rules that construe legislative regulations. In *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504 (1994), for instance, the Court held that, when an agency has concluded that its prior "interpretation of its regulation" should be modified, "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Id.* at 517 (brackets omitted) (quoting *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993)). Yet by forcing an agency to undertake the type of notice-and-comment rulemaking needed to amend legislative regulations simply to change the agency's prior reading of such a regulation, the court of appeals has effectively required the agency to promulgate a *new* legislative regulation that incorporates the agency's current interpretation. Cf. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 571 (2000) (Pierce) ("[S]ince an interpretative rule does not have the force of law, an agency does not have to issue a rule that has the force of law in order to amend a prior interpretative rule.").

The conflict between the APA and the D.C. Circuit's *Paralyzed Veterans* doctrine is further reflected in the court of appeals' extension of its doctrine to agency adjudication. The D.C. Circuit has held that if an agency adopts an interpretation of one of its regulations in an agency adjudication (rather than in an interpretive rule), the agency cannot later alter that interpretation by interpretive rule without notice-and-

comment rulemaking. See *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 994-995, 997-998 (2005) (holding that EPA orders in licensing proceedings were "definitive interpretation[s]" of legislative regulations that could not be modified by a later interpretive rule absent notice-and-comment rulemaking). Yet the agency would be able to modify the same interpretation in a subsequent adjudication, to which the APA's rulemaking provisions would not apply. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292, 294 (1974) (finding it "plain" that an agency may "announc[e] new principles in an adjudicative proceeding"; rejecting the view that "rulemaking was required because * * * [the agency's interpretation] would be contrary to its prior decisions"); see also 5 U.S.C. 551(6) and (7) (agency "adjudication" involves matters "other than rule making"). That anomalous result underscores the artificial and extra-statutory character of the *Paralyzed Veterans* doctrine.

B. Congress Designed The APA's Exemption For Interpretive Rules To Encourage, Not Obstruct, The Public's Access To Agency Interpretations

Congress adopted the APA's interpretive-rule exemption from the Act's notice-and-comment requirement to encourage agencies to promulgate interpretive rules to inform the public of agency interpretations of statutes and legislative rules. The *Paralyzed Veterans* doctrine significantly undermines that statutory purpose.

1. The reason for exempting interpretive rules from notice-and-comment rulemaking is plain. An "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law." 5 U.S.C. 551(4). Interpretive rules are "'issued by an

agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*, 514 U.S. at 99 (quoting *Chrysler Corp.*, 441 U.S. at 302 n.31, which quotes *APA Manual* 30 n.3). Such agency statements, unlike legislative rules, "do not have the force and effect of law." *Ibid.* They "merely [reflect] the agency's present belief concerning the meaning" of the statutes and legislative rules that do. *Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941), reprinted as *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (*Final Report*); see *APA Manual* 30 n.3 (citing *Final Report* for definition of interpretive rules). And because those interpretive statements reflect the agencies' *own* views, not binding legislative rules that have the force of law, Congress presumably determined that it would be an unwarranted encroachment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.

The APA's legislative history confirms as much. In hearings before the House Judiciary Committee, Carl McFarland, the chairman of the American Bar Association (ABA) Committee on Administrative Procedure and a central figure in the APA's development, testified that APA legislation should require agencies to conduct a notice-and-comment proceeding before issuing substantive regulations, but that "no [such] proceeding ought to be required with respect to * * * interpretative regulations." *Administrative Procedure: Hearings on the Subject of Federal Ad-*

ministrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. 30 (1945) (*House Hearings*).[6] The exception for "interpretative rules," he explained, reflects the judgment that an "agency should be as free as it can be" when issuing "interpretative rules" "for the simple reason that those types of regulations are the kind that agencies should be encouraged to make." *Ibid.*

When the Judiciary Committee's Chairman asked whether "[t]he *interpretive regulations of substantive regulations*" should be "publicized" by agencies "because the interpretation is what affects these people," McFarland agreed that such interpretative rules construing substantive regulations "should be publicized." *House Hearings* 30 (emphasis added); see *id.* at 28 (discussing need for public access to agency interpretations). But McFarland made clear at the same time that the proposed statutory notice-and-comment procedure for "the issuance of regulations * * * *should be limited* to substantive regulations." *Id.* at 30 (emphasis added). Cf. *id.* at 29 (ex-

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[6] McFarland served on the Attorney General's Committee on Administrative Procedure that issued an influential 1941 report on administrative procedure (see p. 21, *supra*); later served as chairman of the ABA's Committee on Administrative Law; and has been credited as being a drafter of the legislation that Congress enacted as the APA. See Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, 16 Va. J. Int'l L. 12, 14-17 (1975); see also *House Hearings* 3-4. Under McFarland's leadership, the ABA played a significant role in developing the provisions of S. 7, 79th Cong., 1st Sess. (1945), which Congress revised and later enacted as the APA. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 15-16 (1946); *APA Manual* 6; see also *House Hearing* 20 ("S. 7 * * * represent[s] the latest recommendations of the [ABA] for legislation").

plaining that the Department of Labor's "Wages and Hours Division" issued publicly available pamphlets containing its interpretations that were "helpful to the businessman who wants to comply with [such] interpretations that are laid down with respect to the Wages and Hours Act").

Congress expressed its agreement by enacting 5 U.S.C. 553(b)(A)'s unqualified exemption for interpretive rules from the APA's notice-and-comment requirement. The House and Senate Judiciary Committees explained the APA exemption for rules governing certain proprietary functions in terms relevant here. The Committees explained that such rules often involve interpretations and deemed it "wise to encourage and facilitate the issuance of rules" announcing "interpretations" by "dispensing with all mandatory procedural requirements"; "confer[ring] a discretion upon agencies to decide what, if any, public rulemaking procedures shall be utilized in a given situation"; and ultimately permitting the public to use the APA's "petition procedures" (see 5 U.S.C. 553(e)) if they wish to seek changes. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946) (*House Report*); see S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945) (*Senate Report*). Both Committees likewise explained more generally that the APA's interpretive-rule exemption would confer upon agencies "discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules" in order to allow each agency to determine what interpretive-rulemaking process would be warranted in any particular context. *House Report* 24; see *Senate Report* 14. That explanation "leaves little doubt that Congress intended the discretion of the *agencies* and not that of

the courts be exercised in determining when extra procedural devices should be employed." *Vermont Yankee*, 435 U.S. at 546 (discussing these House and Senate committee reports).

The notice-and-comment exemption for interpretive rules also reflects the understanding that it is "no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities," *Hoctor* v. *United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.). Precluding an agency from publicly announcing an interpretive rule does not alter the agency's expert understanding of its legislative regulations. And requiring an agency to give notice of and seek public comment on an interpretation of a regulation before the agency can announce its own interpretation would impose an unwarranted procedural hurdle and hinder public access to the agency's current understanding of its legislative regulations. Such a requirement therefore would significantly undermine the policy of encouraging agencies to issue interpretive rules to "advise the public of the agency's construction of the statutes and rules which it administers,'" *Guernsey*, 514 U.S. at 99 (citation omitted).

Congress's purpose to encourage agencies to provide the public with interpretive rules carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision was, in fact, erroneous. Agencies should be encouraged to announce their changed views promptly and publicly, rather than allow the public to be misled by an earlier interpretive rule that is contrary to the

agency's best understanding of the regulatory scheme.

2. The D.C. Circuit's *Paralyzed Veterans* doctrine both creates a powerful incentive for an agency to avoid announcing interpretations of its regulations and threatens to significantly delay an agency's correction of such interpretations that the agency concludes are erroneous.

The *Paralyzed Veterans* doctrine inherently creates a significant disincentive to providing administrative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking for any future revisions. That disincentive flows directly from the D.C. Circuit's governing precedents and contravenes Congress's goal of affirmatively *encouraging* agencies to issue interpretive rules that inform the public of the agencies' understanding of the programs they administer.

Moreover, the *Paralyzed Veterans* doctrine can present a formidable barrier for agencies seeking to correct their prior interpretations of regulations. Many complex government programs are heavily dependent upon interpretive rules to inform the public about the agency's understanding of the details of the regulatory regime. The Medicare program, for instance, has "thousands of pages of interpretative rules that address myriad details that are not explicitly resolved by the legislative" regulations. Pierce, 52 Admin. L. Rev. at 553; see, *e.g.*, *Guernsey*, 514 U.S. at 97-99, 101-102. Under the provisions of the APA that Congress enacted, the agency should be free to revisit its interpretations expeditiously through new interpretive rules.

Although MBA has asserted (Br. in Opp. 20) that it "hardly [is] cause for concern" to provide "an incentive to agencies to engage in notice and comment" before altering interpretive rules, the APA's exemption for interpretive rules itself shows that this, in fact, was a particular cause for concern for Congress. Congress enacted that exception specifically to vest agencies with "discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules," and thereby allow each federal agency to decide for itself what, if any, public process it should adopt in any particular context. *House Report* 24; see *Senate Report* 14.

The APA's interpretive-rule exemption ultimately reflects a seasoned understanding of the substantial practical burdens that notice-and-comment rulemaking can impose. Notice-and-comment rulemaking is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, 52 Admin. L. Rev. at 550-551; see U.S. Gov't Accountability Office, *GAO-09-205, Federal Rulemaking* 5, 19 (Apr. 2009) (case study finding average of over four years to complete notice-and-comment rulemaking and that some "rules that were not major took nearly as long or longer to be published"). By exempting agency interpretive rules from such notice-and-comment rulemaking, Congress expressed its judgment that limited agency time and resources should not be expended on notice-and-comment procedures simply to inform the public of the agency's own current interpretation of its regulations.

C. The APA Specifies The Maximum Procedural Requirements That Courts May Enforce For Agency Rulemaking

This Court has "continually repeated" the "very basic tenet of administrative law" that "agencies should be free to fashion their own rules of procedure," and it has squarely rejected the contention that courts may require more than the APA's "minimum" procedural requirements for rulemaking in 5 U.S.C. 553. *Vermont Yankee*, 435 U.S. at 544-545. The Court has thus emphasized that a federal court conducting APA review of an agency rule should review the rule's substantive validity and may enforce the APA's "statutory *minima*" for rulemaking procedure, but should "not stray beyond the judicial province * * * to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 548-549. The *Paralyzed Veterans* doctrine runs afoul of those principles by ignoring Congress's unambiguous command that the APA's notice-and-comment requirements do not apply to interpretive rules. Indeed, this Court has recently reiterated that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *Fox Television Stations, Inc.*, 556 U.S. at 513.

Section 4 of the APA (5 U.S.C. 553) in particular specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking." *Vermont Yankee*, 435 U.S. at 524. That provision "settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang*

Sung v. *McGrath*, 339 U.S. 33, 40 (1950)). For that reason, Section 4's unqualified exemption for interpretive rules, which renders the APA's only notice-and-comment provisions wholly inapplicable to interpretive rulemaking, 5 U.S.C. 553(b)(A), is dispositive.[7]

Legal scholars have long recognized the D.C. Circuit's error in disregarding the limits on judicial intervention contained in Section 4 of the APA and reinforced by the Court's decision in *Vermont Yankee*. The "[a]cademic commentary on [the *Paralyzed Veterans* doctrine] has been scathing." Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006) (Murphy) (citing illustrative critiques). The numerous amici Administrative Law Scholars in this case have stated they "are not aware of a single scholar who agrees with the doctrine." See Amicus Br. 1, 4, 7-9. That highly unusual consistency amongst scholars on such a fundamental

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[7] The Court in *Vermont Yankee* observed that, "if [any circumstances] exist" under which a court might properly impose procedures on an agencies beyond those specified in the APA, "such circumstances" would be "extremely rare." 435 U.S. at 524. The Court suggested that in "some circumstances" in which an agency makes a "'quasi-judicial' determination" that "'exceptionally affect[s]'" a "very small number of persons" and the agency bases its determination "'in each case on individual grounds,'" due process "may" require "additional procedures" for the aggrieved persons. *Id.* at 542 (citation omitted). The Court also suggested that "a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction." *Ibid.* But neither the D.C. Circuit nor MBA has ever attempted to justify the *Paralyzed Veterans* doctrine on such theories, which are inapplicable to the interpretive rulemaking contexts to which *Paralyzed Veterans* applies.

issue of administrative law confirms the fundamental error of the D.C. Circuit's jurisprudence.[8]

D. MBA's Defense Of The *Paralyzed Veterans* Doctrine Is Without Merit

MBA has offered three arguments in defense of the *Paralyzed Veterans* doctrine. See Br. in Opp. 21-25. First, MBA contends (*id.* at 22-23) that an interpretive rule effectively "amends" a legislative regulation when the interpretation alters the agency's prior interpretation of the regulation. Second, MBA contends (*id.* at 24-25) that the doctrine is justified because it prevents capricious changes in agency interpretation. And finally, MBA contends (*id.* at 22) that a single statement in this Court's decision in *Guernsey*, which MBA admits was dictum, supports the D.C.

---

[8] MBA confirms the striking uniformity of legal scholars on the question presented by stating (Br. in Opp. 24 n.12) that not "all" scholars are hostile to the doctrine, but citing only a law student's note and an essay that does not support MBA's position. Professor Murphy authored the essay as an "assigned project" for an academic forum that "require[d] the [author] to play the contrarian" because his assignment was to attempt to "rehabilitate" an "underrated administrative law opinion," *i.e.*, the D.C. Circuit's application of *Paralyzed Veterans* in *Alaska Professional Hunters*. See Murphy, 58 Admin. L. Rev. at 917-918 & n.1. Even in his role as assigned contrarian, Professor Murphy conceded that the "functional and doctrinal critiques" of the D.C. Circuit's doctrine "have undeniable power," *id.* at 926, and concluded that, *inter alia*, the D.C. Circuit's analysis is "internally incoherent," *id.* at 920, "ignores the express exemption of interpretative rules from notice and comment requirement in the APA itself," *id.* at 923, relies "on a strained reading of the APA's rulemaking provisions," *id.* at 938, and "is vulnerable to a strong objection under *Vermont Yankee*" because it "impos[es] procedural requirements beyond those adopted by Congress," *id.* at 927 & n.55.

Circuit's doctrine. None of those contentions has merit.

1. As MBA appears to recognize, the "operative assumption" behind the D.C. Circuit's *Paralyzed Veterans* doctrine is "the belief that a definitive [agency] interpretation is so closely intertwined with the [legislative] regulation [being interpreted] that a significant change to the [interpretation] constitutes a repeal or amendment of the [regulation]" itself. Pet. App. 5a n.3 (emphasis omitted); see also *id.* at 2a (the changed interpretation "in effect amend[s]" the underlying regulation) (citation omitted). That assumption is incorrect.

An agency interpretation no more "amends" a legislative regulation than a judicial interpretation "amends" the source of law it interprets. When an agency issues an interpretive rule, it issues a "statement * * * designed to * * * *interpret* * * * law," 5 U.S.C. 551(4) (emphasis added), not change or amend the law itself. This Court has thus determined that an "interpretive rule" simply reflects "the agency's construction of the statutes and rules which it administers" and, unlike the legislative provisions being interpreted, "do[es] not have the force and effect of law." *Guernsey*, 514 U.S. at 99 (citation omitted); see *Chrysler Corp.*, 441 U.S. at 295-296, 302 n.31 ("substantive rules * * * 'have the force and effect of law'" but "'interpretive rules' * * * do not") (quoting *APA Manual* 30 n.3).

Moreover, the APA "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515. Congress accordingly defined "rule making" to mean an agency pro-

cess for "formulating, amending, or repealing" a rule. 5 U.S.C. 551(5). It follows that the APA's provisions governing "rule making" procedures in 5 U.S.C. 553 apply equally to the process of formulating, amending, or repealing a particular rule, whether interpretive or otherwise. The D.C. Circuit's *Paralyzed Veterans* doctrine disregards that rulemaking symmetry by adhering to the APA's authorization for an agency's initial formulation of an interpretive rule to occur without notice-and-comment rulemaking, while holding that notice-and-comment rulemaking is necessary to amend or repeal the same interpretive rule. Both phases of the interpretive rulemaking process must be governed by the same minimum APA procedure, and the APA's interpretive-rule exemption makes clear that neither requires notice-and-comment rulemaking.

2. MBA argues (Br. 25) that the *Paralyzed Veterans* doctrine "simply prevent[s] capricious agency flip-flopping on established positions." MBA may thereby suggest that the doctrine could be justified under a reviewing court's authority to set aside agency action that is "arbitrary" or "capricious," 5 U.S.C. 706(2)(A). But the D.C. Circuit has never attempted to frame *Paralyzed Veterans*' (procedural) notice-and-comment requirement as a (substantive) limitation on arbitrary and capricious agency action. In all events, this very suit disproves MBA's contention.

MBA never challenged on appeal the district court's holdings that (a) the government's (fully explained) interpretive change was neither arbitrary nor capricious, and (b) the underlying substantive regulations make it "clear" that the agency's revised interpretation corrected an error in its earlier reading. See p. 8, *supra*. MBA's brief in opposition likewise

failed to dispute those substantive holdings. Moreover, any such argument would have been inconsistent with the decision of the court of appeals, which made clear that the government was "free to" "readopt [its] later-in-time interpretation" so long as it "conduct[s] the required notice and comment rulemaking." Pet. App. 3a. In other words, the court of appeals had no occasion to question the district court's unchallenged holding that the 2010 Administrator's Interpretation was itself a sound interpretation of the underlying legislative rule. See *ibid.* ("We take no position on the merits of the[] interpretation."). The court of appeals simply held that interpretive rule to be *procedurally* defective because it was issued without notice-and-comment rulemaking. Cf. *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 377 (1998) ("Substantive review of an agency's interpretation of its regulations is governed only by that general provision of the [APA] which requires courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. 706(2)(A)). Indeed, only in cases such as this, in which an agency's revised interpretation is *not* substantively arbitrary or capricious, does the *Paralyzed Veterans* doctrine invalidate an interpretive rule that would not have been set aside on other grounds.

3. Finally, MBA points (Br. in Opp. 22) to a sentence in *Guernsey* in which this Court "noted (in dicta)" that APA notice-and-comment rulemaking could be required if an agency "'adopt[s] a new position inconsistent with . . . existing regulations,'" *Paralyzed Veterans*, 117 F.3d at 586 (brackets in original) (quoting *Guernsey*, 514 U.S. at 100). That passage does not support the *Paralyzed Veterans* analysis.

In *Guernsey*, this Court addressed the authority of the Secretary of Health and Human Services "to resolve certain [Medicare] reimbursement issues by * * * interpretive rules, rather than by regulations." 514 U.S. at 89-90. The Court ultimately concluded that the relevant Medicare "regulations" did not require reimbursement by generally accepted accounting principles and that the Secretary's relevant Medicare guideline in her Provider Reimbursement Manual (PRM) was "a valid interpretive rule." *Id.* at 90. Throughout its opinion, the Court "distinguished between 'regulations'—[the Court's] shorthand synonym for legislative rules—and 'interpretative rules.'" Pierce, 52 Admin. L. Rev. at 568. More specifically, the Court referred to the relevant legislative rules codified in the Code of Federal Regulations as "regulations," *e.g.*, 514 U.S. at 92-95 (discussing 42 C.F.R. 413.20(a), 413.24 (1994)), and referred to a guideline provision in the PRM, which "d[id] not purport to be a regulation," as a "prototypical example of an interpretive rule" construing a "regulatory requirement," *id.* at 90, 99 (discussing PRM § 233).

After the Court explained that interpretive rules "do not require notice and comment" and "do not have the force and effect of law," *Guernsey*, 514 U.S. at 99, the Court stated (in dictum) that "[w]e can agree that APA rulemaking would still be required if PRM § 233 adopted a new position inconsistent with any of the Secretary's existing [legislative] regulations." *Id.* at 100. That observation reflects that an interpretive rule cannot properly interpret legislative regulations if it is itself "inconsistent" with the legislative regulations being construed. Because such an interpretive rule is a substantively invalid interpretation, the only

way for an agency to adopt a new position that would be inconsistent with its pre-existing legislative regulations is for the agency to conduct, as *Guernsey's* dictum suggests, notice-and-comment rulemaking to amend the existing regulations to reflect the agency's new position. See Pierce, 52 Admin. L. Rev. at 568 (explaining that *Guernsey*'s dictum reflects "the noncontroversial proposition that an agency can only amend a legislative rule by issuing another legislative rule"). Nothing in that observation suggests that notice-and-comment rulemaking would be required to amend an interpretive rule when the agency's revised construction is itself a legally valid interpretation of the underlying provisions. Indeed, such an understanding would be inconsistent with the Court's recognition in *Guernsey* itself that "[i]nterpretive rules do not require notice and comment." *Guernsey*, 514 U.S. at 99.

* * * * *

In short, the *Paralyzed Veterans* doctrine cannot be squared with two fundamental rules of administrative law. First, the APA expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). Second, the APA itself "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *Fox Television Stations, Inc.*, 556 U.S. at 513, such that 5 U.S.C. 553 defines the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking," *Vermont Yankee*, 435 U.S. at 524. This Court should reject the D.C. Circuit's imposition of extra-textual procedural re-

quirements for interpretive rules under *Paralyzed Veterans* and confirm that Congress meant what it said in the APA: The formulation, amendment, and repeal of agency interpretive rules do not require notice-and-comment rulemaking.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2014

PETITIONER'S BRIEF

No. 13-1052

In The Supreme Court of the United States

JEROME NICKOLS, RYAN HENRY, and BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking.

PARTIES TO THE PROCEEDINGS

Petitioners Jerome Nickols, Ryan Henry, and Beverly Buck are former mortgage loan officers seeking overtime compensation in lawsuits filed in federal district court under the Fair Labor Standards Act, 29 U.S.C. § 216(b). Petitioners intervened before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and participated as Defendants before the district court and Appellees before the court of appeals. Respondent Mortgage Bankers Association, a financial services industry trade group, was the Plaintiff in the district court and Appellant in the court of appeals. The United States Department of Labor, Secretary of Labor, and Department of Labor Deputy Wage and Hour Administrator were Defendants in the district court, were Appellees in the court of appeals, and are Petitioners in *Perez v. Mortgage Bankers Ass'n*, No. 13-1041.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT	4
SUMMARY OF ARGUMENT	24
ARGUMENT	28
I. THE D.C. CIRCUIT'S *PARALYZED VETERANS* DOCTRINE CONFLICTS WITH THE APA	28
A. The *Paralyzed Veterans* Doctrine Is Inconsistent with the Plain Language of the APA	28
B. The *Paralyzed Veterans* Doctrine Renders Other Statutory Provisions Superfluous	30
C. The *Paralyzed Veterans* Opinion Grounded Its Rule on Faulty Reasoning	31
D. The D.C. Circuit's Novel Textual Justification for the Doctrine Is Unpersuasive	34
E. The *Paralyzed Veterans* Doctrine Exceeds the Scope of Judicial Review Contemplated by the APA	35
1. *Vermont Yankee*	36
2. *Fox Television*	38

TABLE OF CONTENTS – Continued

Page

II. THE *PARALYZED VETERANS* DOCTRINE UNDERMINES THE CAREFUL BALANCE STRUCK BY CONGRESS 39

A. The Law Affords Numerous Checks on Arbitrary and Unfair Shifts in Agencies' Positions 41

1. Arbitrary and capricious review 41

2. Judicial deference 42

3. Consistency with the underlying regulations 44

4. Statutory safe harbors 45

5. Due process 46

B. The *Paralyzed Veterans* Doctrine Imposes Significant Negative Consequences Congress Sought To Avoid 49

III. IF THIS COURT ADOPTS THE *PARALYZED VETERANS* DOCTRINE, MORTGAGE BANKERS CANNOT PREVAIL BECAUSE THE 2006 OPINION LETTER WAS NOT THE PRODUCT OF NOTICE AND COMMENT 54

CONCLUSION 56

TABLE OF AUTHORITIES

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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5 U.S.C. § 706 ..... *passim*
15 U.S.C. § 57 46
15 U.S.C. § 1640 46
18 U.S.C. § 1464 38
19 U.S.C. § 1625 30
21 U.S.C. § 371 30
28 U.S.C. § 1254 3
29 U.S.C. § 206 9
29 U.S.C. § 207 9
29 U.S.C. § 213 9
29 U.S.C. § 216 ii
29 U.S.C. § 259 ..... 26, 45, 46
29 U.S.C. § 626 46
29 U.S.C. § 1028 46
42 U.S.C. § 2000 46

REGULATIONS

29 C.F.R. § 541.200 ..... 10, 17
29 C.F.R. § 541.201 ..... 10, 17

TABLE OF AUTHORITIES – Continued

Page

29 C.F.R. § 541.202 ..... 11, 17

29 C.F.R. § 541.203 17

29 C.F.R. § 541.204 17

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29 C.F.R. § 541.206 17

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29 C.F.R. § 541.500 10

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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BRIEF FOR PETITIONERS

INTRODUCTION

The D.C. Circuit's doctrine prohibiting agencies from modifying interpretations of agency regulations without notice and comment contradicts the Administrative Procedure Act and upsets the careful balance struck by Congress.

The Administrative Procedure Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). Section 553 of the Act generally requires agencies to engage in notice-and-comment rulemaking, but categorically exempts "interpretative rules" from the notice-and-comment requirement. 5 U.S.C. § 553(b).

The D.C. Circuit has added a judicial gloss to the statute. It holds that although an agency may issue an *initial* interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

The D.C. Circuit's *Paralyzed Veterans* doctrine – which controlled the outcome in this case – is incorrect.

The doctrine is unfaithful to the text of the Administrative Procedure Act, which states unambiguously that all interpretative rules are exempt from notice and comment.

By straying from the text of the statute, the *Paralyzed Veterans* doctrine undermines the thoughtful scheme created by Congress, upsetting a carefully-struck balance between process and predictability on the one hand and agency flexibility on the other. In so doing, the doctrine ignores numerous firmly grounded checks – arbitrary and capricious review, statutory safe harbors, and due process, among others – protecting regulated communities from unexplained and arbitrary shifts in agency interpretation. By the same token, the D.C. Circuit's one-bite-at-the-interpretive-apple rule creates a host of negative consequences Congress sought to avoid: preventing agencies from correcting obvious mistakes, chilling the informal dialogue between government and regulated groups, and increasing the administrative burden on agencies, businesses, and citizens alike.

The *Paralyzed Veterans* doctrine cannot withstand scrutiny, and the D.C. Circuit's decision in this case must be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is available

at *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at Appendix 1a.[1] The district court's opinion is available at *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012), *rev'd sub nom. Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at Appendix 15a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its Opinion and Final Judgment on July 2, 2013. App. 13a. The D.C. Circuit denied Petitioners' timely-filed petition for rehearing en banc on October 2, 2013. App. 54a. Chief Justice Roberts twice granted Petitioners' applications for an extension of time within which to file a petition for a writ of certiorari, extending the deadline to and including February 28, 2014. The petition was filed on that date and granted on June 16, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] All citations to the appendix refer to the appendix accompanying Petitioners' Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act are reproduced at Appendix 71a.

STATEMENT

Congress authorized the Department of Labor ("DOL") to issue regulations defining various statutory exemptions contained in the Fair Labor Standards Act ("FLSA"). In addition to promulgating formal regulations, the DOL – like many other federal agencies – has traditionally issued informal interpretations addressing how the regulations apply to various factual scenarios.

Over the years, the DOL had issued a series of opinion letters concluding that mortgage loan officers – bank employees who sell mortgage products to customers – do not qualify for the FLSA's administrative exemption. In 2006, however, the DOL changed its interpretation, concluding that such employees *do* qualify for the exemption. In 2010, the DOL restored its original and long-standing interpretation, concluding once again that mortgage loan officers do not qualify for the exemption.

The DOL's inconsistency in this case is not happenstance. Rather, the DOL's flip flopping was the result of a concerted lobbying campaign by Mortgage Bankers Association, the Respondent in this case, to change the DOL's interpretation to benefit

the financial services industry in ongoing litigation. Although Mortgage Bankers' lobbying efforts briefly succeeded, the DOL's short-lived 2006 interpretation was widely condemned as both substantively incorrect and the product of regulatory capture.

When the DOL acted in 2010 to restore its original interpretation, Respondent Mortgage Bankers sued the Secretary of Labor. Mortgage Bankers, having successfully convinced a federal agency to change its interpretation without input from anyone else, now argued that the DOL broke the law when the agency changed its interpretation back without first seeking input from affected parties through notice-and-comment rulemaking.

The district court dismissed Mortgage Bankers' case, upholding the DOL's 2010 interpretation as both substantively correct and procedurally sound. But Mortgage Bankers found a sympathetic audience at the D.C. Circuit. Applying the controversial *Paralyzed Veterans* doctrine, the D.C. Circuit vacated the DOL's 2010 interpretation. The *Paralyzed Veterans* doctrine holds that although an agency may issue an *initial* interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586.

A brief description of the background and procedural history of this case follows. Section One addresses relevant provisions of the Administrative Procedure Act. Section Two examines the FLSA, as well as the regulations and interpretations issued by the DOL addressing loan officers' exemption status under the Act. Section Three summarizes the procedural history of this case and the decisions below.

1. The Administrative Procedure Act. Congress enacted the Administrative Procedure Act ("APA"), 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500, *et seq.*), as a "basic and comprehensive regulation of procedures in many agencies." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950).

a. Section 551 of the APA defines the terms "rule" and "rule making" broadly. A "rule" "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4). "Rule making," in turn, "means the agency process for formulating, amending, or repealing a rule . . . ." § 551(5).

Section 553 of the Act sets forth the procedural requirements for agency rulemaking. Section 553(b) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . . . " § 553(b). Section 553(c) further provides that, "[a]fter notice required by this section, the agency shall give

interested persons an opportunity to participate in the rule making through submission of written [comments]." § 553(c). Together, these provisions describe what is commonly referred to as notice-and-comment rulemaking.

Section 553(b), however, contains a number of exceptions to the notice-and-comment rulemaking requirement. Relevant here, section 553(b)(A) provides that the APA's notice-and-comment requirement "does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b)(A).

b. Courts and scholars refer to rules that are subject to the APA's formal rulemaking procedures as "legislative rules," "substantive rules," or simply "regulations." *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 61 (2007); Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 233-34 (3d ed. 1994). Legislative rules "bind[ ] members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority." Davis & Pierce, *supra*, at 233. "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979) (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure*

Act 30 n.3 (1947)). "'Such rules have the force and effect of law.'" *Id.*

Interpretative rules (often referred to as interpretive rules),[2] by contrast, are rules "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* at 302, n.31; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Interpretive rules "do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Guernsey*, 514 U.S. at 99. Interpretive rules "merely [reflect] the agency's present belief concerning the meaning" of the statutes and regulations administered by the agency. Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies,* S. Doc. No. 77-8, at 27 (1st Sess. 1941).

c. Section 706(2)(D) of the APA governs judicial review of agency action. That section authorizes courts to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or

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[2] *See* Bryan A. Garner, *Modern American Usage* 476 (3d ed. 2009) ("[*I*]*nterpretive* has gained ground in the last 50 years – so much so that it's about five times as common in print as *interpretative*. . . . Refight an old fight, if you like, and stick to *interpretative*. But *interpretive* has already taken hold." (emphasis in original)). The two terms are used interchangeably in this brief.

"without observance of procedure required by law." § 706(2)(D).

2. The Fair Labor Standards Act. The FLSA generally requires employers to pay employees both minimum wage and overtime compensation. 29 U.S.C. §§ 206-207. There are certain statutory exemptions, however, to the FLSA's minimum wage and overtime requirements. Relevant here, Congress exempted any employee "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." The FLSA, however, grants the Secretary of Labor authority to "defin[e] and delimi[t]" the scope of these exemptions. 29 U.S.C. § 213(a)(1). Because of Congress' broad delegation of rulemaking authority, the regulations issued by the DOL have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The DOL has promulgated detailed regulations defining these so-called white collar exemptions, *see* 29 C.F.R. § 541, and "[t]he major substantive provisions of the [white collar] regulations have remained virtually unchanged for 50 years." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541). In order to further the broad remedial purpose of the Act, FLSA

"exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

a. This case touches on two of the white collar exemptions: the outside sales exemption and the administrative exemption, both of which require brief examination.

i. The current outside sales regulations exempt "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [the Act]" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a)(1)-(2).

ii. The administrative exemption, as defined by the Secretary's regulations, covers any employee (1) "[c]ompensated on a salary or fee basis at a rate of not less than $455 per week," (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. § 541.201(a). "To meet this requirement, an employee must perform

work directly related to assisting with the running or servicing of the business," as distinguished, for example, from "production" or "selling a product." *Id.*

Courts typically employ the "administrative/productive work dichotomy" described in the DOL's regulations. *See Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 901 (3d Cir. 1991) (citing 29 C.F.R. § 541.205(a) (1991)). Under that analysis, the administrative duties of "running the business" – for example, accounting, budgeting, quality control, research, safety and health, human resources, or regulatory compliance, *see* 29 C.F.R. § 541.201(b) – are juxtaposed with "production" activities, such as manufacturing and sales, that involve "the day-to-day carrying out of the business' affairs." *Bratt v. Cnty. of L.A.*, 912 F.2d 1066, 1070 (9th Cir. 1990).

The exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). The term applies to the kinds of "decisions normally made by persons who formulate policy within their spheres of responsibility or who participate in this process or who exercise authority to commit the employer in a substantial respect, financial or otherwise." *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997) (citing 29 C.F.R. § 541.207(d)(2) (1997)).

b. Mortgage loan officers are workers employed by banks and mortgage companies who sell loan

products to individual consumers. Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation, No. 2010-1, 2010 WL 1822423, at *1 (Mar. 24, 2010) [hereinafter "2010 Interpretation"], App. 108a-109a (citing cases). Loan officers contact potential customers and collect required financial information, such as income, employment history, assets, investments, and debts, from each customer. *Id.* Loan officers enter the information into a computer program, and the computer identifies which loan products may be offered based on the lending guidelines of the company (and in some cases, the guidelines of the government, for example in the case of an FHA loan). *Id.* Loan officers then assess the loan products identified and discuss the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. *Id.*

Loan officers earn commissions tied directly to sales volume. 2010 Interpretation, 2010 WL 1822423, at *5-6, App. 118a-122a (citing cases). They are subject to strict sales quotas and work long hours to hit their sales targets. *Id.* Loan officers typically receive sales training where they learn proven sales techniques, such as how to close a sale when a prospective customer wants to talk to her spouse or shop around. *Id.* Sales managers frequently encourage and motivate loan officers to close sales, for example, by offering prizes in a sales contest or showing clips from classic sales films like *Boiler Room* or *Glengarry Glen Ross*. *Id.* Loan officers are also promoted, evaluated,

disciplined, and terminated based on their sales production. *Id.*

According to the Bureau of Labor Statistics, nearly 300,000 people – approximately 1 in every 500 workers in the United States – work as loan officers. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Loan Officers (15th ed. 2014), http://www.bls.gov/ooh/Business-and-Financial/Loan-officers.htm.

c. The DOL has, on six occasions, publicly issued interpretive guidance addressing mortgage loan officers' exemption status under the FLSA. Because this case turns on the legal authority of an agency to modify its interpretations, the DOL's six relevant interpretations are necessarily described in some detail here.

i. In a series of four opinion letters published between 1971 and 2006, the agency's position was clear and consistently held: although loan officers qualify for the FLSA's outside sales exemption if the employees perform their job duties outside the office, loan officers do not qualify for the Act's administrative exemption.[3]

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[3] *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971), App. 72a (concluding that mortgage loan officers who customarily and regularly perform work outside the office meet the requirements of the FLSA's outside sales exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999), App.

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ii. Traditionally, loan officers were nearly uniformly classified as exempt outside salespersons. *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971), App. 72a. But beginning in the late-1990s, the rise of the Internet and sophisticated marketing campaigns made it possible for loan officers to perform their work without ever leaving the office. No longer able to rely on the outside sales exemption, employers in the financial services industry faced a dilemma: either begin paying overtime, or else classify 300,000 loan officers as administrative employees – a move that would contravene clear guidance from the DOL concluding that loan officers do not qualify for the administrative exemption. *See supra* note 3.

iii. Many employers saw the writing on the wall and began paying overtime, but a handful decided to test their position in the courts.

Consistent with the DOL's interpretations, federal courts uniformly held that mortgage loan officers do not qualify for the FLSA's administrative exemption. In the leading case, *see Casas v. Conseco Fin.*

75a (holding that mortgage loan officers do not meet the requirements of the FLSA's administrative exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001), App. 79a (reaffirming that loan officers do not qualify for the administrative exemption); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-11, 2006 WL 1094597 (Mar. 31, 2006), App. 82a (reaffirming that loan officers who work outside the office qualify for the outside sales exemption).

Corp., No. Civ.00-1512, 2002 WL 507059, at *6-10 (D. Minn. Mar. 31, 2002), the court recognized that as loan officers "making direct contact with customers, it is [their] primary duty to sell [the company's] lending products on a day-to-day basis." *Id.* at *9. The court observed that loan officers "are responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer's financial needs." *Id.* "[T]hese duties establish that [loan officers] are primarily involved with 'the day-to-day carrying out of the business' rather than 'the running of [the] business [itself]' or determining its overall course or policies." *Id.* (citations omitted); *see also Wong v. HSBC Mortg. Corp.*, No. C-07-2446 MMC, 2008 WL 753889, at *6-7 (N.D. Cal. Mar. 19, 2008) (holding that loan officers do not qualify for the administrative exemption).

Although courts rejected the argument that the nation's nearly 300,000 loan officers were now administering banks, federal courts continued to be receptive to employers wishing to invoke the outside sales exemption – provided, of course, that the loan officers customarily and regularly worked outside the office. *See, e.g.*, *Olivo v. GMAC Mortg. Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004). But as courts recognized, the financial services industry could not have its cake and eat it too. By their very terms, the administrative and outside sales exemptions are mutually exclusive: "a [loan officer] cannot be simultaneously exempt under the outside sales exemption and the administrative exemption because the former requires the

employee to have a primary job duty of sales, whereas that same primary job duty disqualifies an employee from coverage under the latter." *See, e.g.*, *Swigart v. Fifth Third Bank*, 870 F. Supp. 2d 500, 511 (S.D. Ohio 2012) (citations omitted).

iv. Between 2003 and 2006, employers facing litigation, and losing in the courts, began lobbying the DOL to reverse its employee-friendly loan officer interpretations. Respondent Mortgage Bankers hired Robert Davis, a former Solicitor of the DOL, as the group's chief lobbyist. R., Intervenors' Mem. Opp'n Summ. J., Exs. 3 & 4, ECF Nos. 30-3, -4. During the same time period, Mr. Davis served as chief litigation counsel to Quicken Loans, Inc., which was engaged in overtime litigation against hundreds of its former loan officer employees. *Id.*

Mortgage Bankers saw its first opportunity to change the law in 2003. On March 31, 2003, the DOL announced plans to update and modernize the FLSA's overtime regulations, and invited public comment. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560 (Mar. 31, 2003). Mortgage Bankers, through Mr. Davis, submitted detailed comments arguing that the white collar exemptions should be broadened so that mortgage loan officers would fall under the coverage of the administrative exemption. R., Intervenors' Mem. Opp'n Summ. J., Ex. 4 at 7-10, ECF No. 30-4.

Mortgage Bankers' comments were not adopted. The DOL's amendments to the white collar regulations went into effect on August 23, 2004. *See generally* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122. But despite Mr. Davis' lobbying, the regulations were not broadened. On the contrary, the new regulations did not alter the substance of the administrative exemption.[4] The DOL did, however, add a new regulatory provision discussing the application of the administrative exemption to employees in the financial services industry. This new section confirmed that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *See* 29 C.F.R. § 541.203(b). And if there was any doubt about who the DOL was referring to when it described "an employee whose primary duty is selling financial products," the commentary accompanying the new provision cited *Casas*, 2002 WL

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[4] The DOL did raise the salary threshold required for invoking the administrative exemption from $155 per week to $455 per week. The exemption's duties requirements, however, did not undergo any substantive change. *See Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892 n.6 (D.C. Cir. 2010) (citing Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22,126 & 22,139) (recognizing that the most recent administrative exemption regulations were merely meant to "consolidate and streamline" and ultimately be "consistent with" the old regulations). *Compare* 29 C.F.R. §§ 541.200-.207 (2003), *with* 29 C.F.R. §§ 541.200-.203.

507059, as the prime example, which, as previously discussed, held that loan officers do not qualify for the administrative exemption because their primary duty is sales. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22,145.

Mortgage Bankers had failed to change the law. But Mr. Davis was undaunted. In 2005, Mr. Davis began seeking an informal interpretation from the DOL stating that mortgage loan officers qualified for the administrative exemption.

From around July 2005 to September 2006, Mr. Davis contacted some of the personal connections he had developed at the DOL during his tenure at the agency and lobbied for an opinion letter reversing the agency's prior loan officer interpretations. *See* R., Intervenors' Mem. Opp'n Summ. J., Ex. 3, Davis Decl. ¶ A, ECF No. 30-3; *see also id.* Ex. 7, ECF No. 30-7 (email to DOL personnel); *id.* Ex. 6, ECF No. 30-6 (privilege log showing correspondence between Mr. Davis and Quicken's counsel regarding the requested opinion letter).

But Mr. Davis did not simply request the DOL's impartial application of the FLSA to a hypothetical set of facts. Instead, correspondence obtained through Freedom of Information Act requests shows that Mr. Davis and DOL attorneys worked hand-in-hand on the interpretation, behind closed doors, extensively

negotiating both the factual assumptions and legal analysis on which the DOL's opinion would be based.[5]

Despite Mr. Davis' representation of Quicken Loans in litigation involving the classification of the company's loan officers, he explicitly represented to the DOL that the opinion letter was "not sought by a party to pending private litigation concerning the issue addressed herein." Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *6 (Sept. 8, 2006), App. 106a.

v. On September 8, 2006, in a sharp break from its long-settled position, the DOL issued an opinion letter concluding that mortgage loan officers are exempt administrative employees. *See id.*, App. 91a.[6]

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[5] For example, on July 28, 2005, following a preliminary meeting with agency personnel, Mr. Davis submitted a memorandum to DOL attorneys containing a draft opinion letter request. R., Intervenors' Mem. Opp'n Summ. J., Ex. 9, ECF No. 30-9. The draft contained proposals for the facts that would be assumed as well as the legal analysis to be used by the DOL in reaching the requested conclusion. *Id.* at 5-7. Following another meeting between Mr. Davis and DOL attorneys, Mr. Davis sent a follow-up email addressing factual distinctions that he believed would be "appropriate" for the DOL to make in its opinion letter, as well as supplemental legal analysis to be used in the letter. *Id.*, Ex. 7, ECF No. 30-7.

[6] Recognizing that the 2004 revisions to the FLSA overtime regulations did not alter the substance of the administrative exemption, the 2006 opinion letter asserted that its conclusion applied in equal force under both the current and prior versions of the regulations. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *2 (Sept. 8, 2006), App. 96a.

Although the 2006 opinion letter broke with over a generation's worth of DOL guidance and federal case law, the 2006 letter did not cite – let alone discuss – the mountain of prior authority concluding that mortgage loan officers do not qualify for the administrative exemption. Rather, the letter simply declared, for the first time, that loan officers met the exemption's requirements.[7]

In the candid words of one federal judge, "[t]he fact of the matter is, an extremely powerful trade association cause[d] a shift in federal law . . . effectively manipulat[ing] an agency to issue a letter that governs the outcome of federal litigation without anybody being able to address it," creating a result that is "highly unfair, highly disruptive to employees, plaintiffs and courts who have to deal with [it]." R.

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[7] The 2006 interpretation concluded that only employees who spend more than 50 percent of their total working time "encouraging . . . individual potential customer[s] to do business with [their] employer's . . . company rather than a competitor," qualify as non-exempt salesmen. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, FLSA2006-31, 2006 WL 2792445, at *2, *6 (Sept. 8, 2006), App. 94a-95a, 105a. Of course, no employee in America, including the most dedicated used car salesman, meets that standard. And the conclusion flatly contravenes long-standing FLSA regulations, which teach that an employee's "primary duty" "must be based on . . . the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). As one federal magistrate examining the 2006 interpretation wryly put it, "[h]ad Willy Loman's work day been sliced up i[n] such detail, even Arthur Miller might not have recognized him as a salesman." *See Henry v. Quicken Loans, Inc.*, No. 04-CV-40346, 2009 WL 3270768, at *16 n.23 (E.D. Mich. July 16, 2009).

Intervenors' Mem. Opp'n Summ. J., Ex. 10 at 5, 7-8, ECF No. 30-10.

vi. The DOL's 2006 interpretation did not survive long. Three-and-a-half years later, on March 24, 2010, the DOL issued its 2010 Interpretation, restoring the agency's original and long-held position that mortgage loan officers do not qualify for the administrative exemption. 2010 Interpretation, 2010 WL 1822423, at *1, App. 107a. The 2010 interpretation forcefully withdrew the contrary 2006 opinion letter, analyzing the 2006 letter's numerous analytical flaws in detail, citing the letter's inconsistency with the governing regulations and case law, and criticizing the 2006 letter's "misleading assumption and selective and narrow analysis." *Id.* at *4-9, App. 114a-128a.

3. Procedural History. a. On January 12, 2011, Respondent Mortgage Bankers filed suit in federal district court seeking an order vacating and enjoining the implementation of the 2010 Interpretation. Mortgage Bankers contended that the DOL violated the APA by issuing the 2010 Interpretation without notice and comment, and argued alternatively that the 2010 Interpretation should be set aside as arbitrary, capricious, and contrary to law. *Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 195, App. 15a.

b. Petitioners are former mortgage loan officers engaged in litigation against Quicken Loans, alleging that Quicken improperly misclassified them as

exempt under the FLSA.[8] Petitioners intervened as defendants before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and participated as parties before the district court and court of appeals.

c. On June 6, 2012, the district court granted Petitioners' and the DOL's motions for summary judgment. *Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 208-10, App. 15a. On the procedural argument, the district court held itself bound by the *Paralyzed Veterans* doctrine, but concluded that Mortgage Bankers could not invoke the doctrine because Respondent failed to show "substantial and justifiable reliance on a well-established agency interpretation." *Id.* at 208, App. 43a. On the substantive point, the district court had little trouble affirming the DOL's conclusion that mortgage loan officers do not qualify for the administrative exemption. In the words of the district court, "the DOL is . . . tasked with determining whether specific employees' 'primary duty is selling financial products,'" in which case, the employee "does not qualify for the administrative exemption." *Id.* at 209, App. 47a.

d. Mortgage Bankers appealed, but abandoned the argument that the 2010 Interpretation was

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[8] Petitioner Ryan Henry is a plaintiff in *Henry v. Quicken Loans, Inc.*, No. 04-CV-40346 (E.D. Mich.). Petitioner Beverly Buck is a plaintiff in *Mathis v. Quicken Loans, Inc.*, No. 07-CV-10981 (E.D. Mich.), and Petitioner Jerome Nickols is a plaintiff in *Chasteen v. Rock Financial, Inc.*, No. 07-CV-10558 (E.D. Mich.).

arbitrary, capricious, and inconsistent with the underlying regulations. *See generally* R., D.C. Cir. Br. for Appellant Mortg. Bankers Ass'n.

The D.C. Circuit reversed. The court began by reaffirming the *Paralyzed Veterans* doctrine, declining Petitioners' invitation to overrule the doctrine as inconsistent with the APA. *Mortg. Bankers Ass'n*, 720 F.3d at 967 n.1, App. 2a. Applying the doctrine, the court concluded that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Id.* at 967, App. 2a (citing *Paralyzed Veterans*, 117 F.3d at 586, and *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)). Addressing the district court's reasoning, the D.C. Circuit held that a party challenging an agency's changed interpretation need not prove that anyone relied on the prior interpretation. *Id.* at 967-68, 970, App. 2a-3a, 9a (citing *Paralyzed Veterans*, 117 F.3d at 586, and *Alaska Hunters*, 177 F.3d 1030). Rather, according to the D.C. Circuit, agencies must employ notice-and-comment rulemaking in every case so long as there is (1) a definitive interpretation, and (2) a significant change. *Id.* at 969, App. 5a.[9]

[9] Petitioners argued, both at the district court and the court of appeals, that if *Paralyzed Veterans* remained good law, the 2006 interpretation would itself be procedurally invalid. R., Intervenors'

SUMMARY OF ARGUMENT

I. The *Paralyzed Veterans* doctrine conflicts with the APA.

A. The doctrine contradicts the plain language of the Act, which exempts "interpretative rules" from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553.

B. The doctrine violates other rules of statutory interpretation, and would render superfluous other statutory provisions requiring notice and comment in limited circumstances.

C. The *Paralyzed Veterans* opinion itself grounded its rule on a misreading of the APA and this Court's precedents. The opinion improperly expanded on the accepted principle that an agency must engage in notice and comment before revising its *regulations*, and wrongly held that an agency must also go through notice and comment before changing its *interpretations*.

D. The panel below called the doctrine's "operative assumption" "the belief that a *definitive* interpretation is so closely intertwined with the regulation

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Mem. Opp'n Summ. J. 34-36, ECF No. 30; R., D.C. Cir. Br. for Intervenors-Appellees at 39-41. After all, the 2006 interpretation reversed a prior agency interpretation without notice and comment. The district court did not confront the issue because it upheld the 2010 Interpretation on other grounds. *See generally Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 208, App. 44a. The D.C. Circuit, for reasons that are unclear, simply ignored the argument.

that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3, App. 5a (emphasis in original). That assumption is wrong. The assumption defies logic and disrespects the distinction drawn in the APA between legislative and interpretive rules.

E. The *Paralyzed Veterans* doctrine exceeds the authority of courts to impose procedural requirements on agencies. The doctrine contravenes the principle that the APA "establishe[s] the maximum procedural requirements which Congress was willing to have the courts impose upon agencies[,]" *Vt. Yankee*, 435 U.S. at 524, and "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

II. The *Paralyzed Veterans* doctrine undermines the careful balance struck by Congress.

A. The doctrine ignores numerous safeguards protecting regulated communities from unfair and unforeseen shifts in agency interpretation. These safeguards adequately protect regulated parties and demonstrate that Congress understood the consequences of exempting interpretive rules from notice and comment.

1. Congress incorporated arbitrary and capricious review into the APA as the primary vehicle to address shifting agency interpretations. When an agency revises its interpretation, the agency "must show that there are good reasons for the new policy,"

Fox Television, 556 U.S. at 515, "must explain why 'it now reject[s] the considerations that led it to adopt that initial policy,'" *id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment), and must address any reliance interests upset by the interpretive shift, *id.* at 515 (majority opinion).

2. Under this Court's judicial deference doctrines, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

3. An agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations. *See* 5 U.S.C. § 706(2)(A). Agencies may not, "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

4. Numerous statutory safe harbors shield regulated parties from liability when they rely in good faith on agency interpretations. Relevant here, the Portal-to-Portal Act of 1947 absolves employers from liability under the FLSA when they act in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation." 29 U.S.C. § 259(a). These statutory safe harbors protect regulated entities from the

shifting winds of agency interpretations, and demonstrate Congress' understanding that changes in interpretation will happen from time to time.

5. Due process guarantees "that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). The government may not, consistent with due process, extract penalties from private parties for conduct that occurred before they received fair notice of their potential liability. *Id.* at 2320.

B. The *Paralyzed Veterans* doctrine creates serious negative consequences Congress sought to avoid.

The doctrine deprives agencies of a crucial source of flexibility and prevents agencies from correcting obvious mistakes. By collapsing the distinction between legislative and interpretive rules, the doctrine chills the informal dialogue between government and regulated groups. At the same time, the doctrine creates perverse incentives for agencies to issue vague regulations, and increases the costs and administrative burden on agencies, businesses, and citizens.

III. Assuming the *Paralyzed Veterans* doctrine exists, it must be applied fairly. The doctrine must not be invoked selectively to invalidate only the most recent interpretive change.

ARGUMENT

I. THE D.C. CIRCUIT'S *PARALYZED VETERANS* DOCTRINE CONFLICTS WITH THE APA

The *Paralyzed Veterans* doctrine cannot be reconciled with the text of the APA, which unambiguously exempts all interpretive rules from notice and comment. Moreover, the D.C. Circuit's doctrine contravenes the important principle that courts may not impose additional procedural requirements on agencies beyond those specifically required by Congress.

A. The *Paralyzed Veterans* Doctrine Is Inconsistent with the Plain Language of the APA

This case begins and ends with the text of the APA. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Section 553 of the APA sets forth the procedural requirements for rulemaking, including notice, comment, and publication of rules. 5 U.S.C. § 553. Section 553(b), however, exempts from the notice-and-comment requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b).

This Court has long recognized that, under the plain language of the APA, "[i]nterpretive rules do not require notice and comment." *Guernsey*, 514 U.S. at 99; *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply . . . only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

The statute could not be more clear on its face: interpretive rules are exempt from notice and comment. The APA admits no exception here, and certainly draws no distinction between initial interpretations and subsequent interpretations. So long as both rules are interpretive, notice-and-comment is not required. In the absence of any contrary congressional command, *Paralyzed Veterans*' one-bite rule cannot be reconciled with the plain text of the APA. *See Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (concluding that the *Paralyzed Veterans* doctrine is "not persuasive" because it "conflicts with the APA's rulemaking provisions, which exempt *all* interpretive rules from notice and comment" (emphasis added)); *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("[N]o notice-and-comment rulemaking is required to amend a previous *interpretive* rule." (emphasis in original)).

B. The *Paralyzed Veterans* Doctrine Renders Other Statutory Provisions Superfluous

Although the text of the APA is clear and unambiguous, the *Paralyzed Veterans* doctrine fares no better examined through the lens of other relevant canons of statutory construction.

The in pari materia canon "is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (quoting *United States v. Stewart*, 311 U.S. 60, 64 (1940)). "Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of (an) earlier act . . . .'" *Id.*

Numerous statutory provisions illustrate that Congress knew how to write the *Paralyzed Veterans* doctrine into law, and chose not to do so when it enacted the APA. For example, under the Tariff Act of 1930, the Secretary of the Treasury may not issue an interpretive ruling modifying or revoking a previous interpretive ruling without first engaging in notice and comment. 19 U.S.C. § 1625(c). As a second example, the FDA Modernization Act explicitly requires opportunity for public comment before the Secretary makes "changes in interpretation" of a relevant "statute or regulation." 21 U.S.C. § 371(h)(1)(C)(i).

These statutes show that Congress is capable of writing the *Paralyzed Veterans* doctrine into law in

circumstances where it sees fit. But the D.C. Circuit mistakenly requires similar procedures across the board, despite Congress' decision to exempt interpretive rules from such a categorical requirement under the APA. Indeed, the *Paralyzed Veterans* doctrine effectively makes these narrowly-targeted notice-and-comment provisions superfluous. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (recognizing the familiar "canon against interpreting any statutory provision in a manner that would render another provision superfluous[,]" a principle of statutory interpretation which "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

C. The *Paralyzed Veterans* Opinion Grounded Its Rule on Faulty Reasoning

The *Paralyzed Veterans* opinion itself, taken on its own terms, similarly fails to persuade. The opinion – remarkable for its atextual character – makes almost no effort to square its sweeping rule with the APA. Without citation to any statute, case, or other authority, *Paralyzed Veterans* simply declares that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586.

In a later passage, *Paralyzed Veterans* cites section 551(5) of the APA and this Court's opinion in

Guernsey, 514 U.S. 87, but neither authority supports the court's sweeping new rule.

Citing section 551(5), the court stated that "[u]nder the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.'" *Paralyzed Veterans*, 117 F.3d at 586 (emphasis in original). But section 551(5) merely supplies the APA's definition of "rule making," stating that the term "means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Section 553 sets forth the actual procedures required for rulemaking, and exempts interpretive rules from notice and comment. *See* § 553(b)(A). Reading the two sections together, it is readily apparent that when an agency "formulat[es]," "amend[s]," or "repeal[s]" a *legislative* rule – that is, a formal regulation – notice and comment is required. But at the same time, an agency remains free to issue an *interpretive* rule, whether by formulation, amendment, or repeal, without notice and comment. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 567 (2000) ("When an agency issues, amends, or repeals a legislative rule, it must use the notice and comment procedure. When it issues, amends, or repeals an interpretative rule, it is not required to use the notice and comment procedure.").

Paralyzed Veterans cites *Guernsey* for the proposition that "APA rulemaking is required where an interpretation 'adopt[s] a new position inconsistent with . . . existing regulations.'" *Paralyzed Veterans*,

117 F.3d at 586 (citing *Guernsey*, 514 U.S. at 100). But *Guernsey* won't bear the weight of *Paralyzed Veterans*. Nothing in *Guernsey* suggests that an agency must engage in notice-and-comment rulemaking where an agency's interpretation is consistent with the regulations but conflicts with a prior interpretation.

At issue in *Guernsey* was the validity of a provision found in the Medicare Provider Reimbursement Manual. *Guernsey*, 514 U.S. at 90. The manual, which was issued without notice and comment, interpreted various Medicare legislative rules (referred to in the opinion simply as "regulations") to mean that certain reimbursable losses must be amortized over a period of years rather than reimbursed in the year of the loss. *Id.* After assuring itself that the manual was consistent with the regulations, *id.* at 92-95, this Court held that it was "proper for the Secretary to issue a guideline or interpretive rule," calling the manual "a prototypical example of an interpretive rule issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," *id.* at 97, 99 (citations and internal quotation marks omitted). The Court noted that "APA rulemaking would still be required if [the manual] adopted a new position inconsistent with any of the Secretary's existing regulations." *Id.* at 100.

Put in context, this Court's observation in *Guernsey* stands for the unremarkable proposition that an interpretive rule that conflicts with the governing *legislative rules* is invalid. *Paralyzed Veterans*

impermissibly expands this principle to hold that an interpretive rule that is *consistent* with the relevant legislative rules but *inconsistent* with a prior interpretive rule is procedurally invalid. Nothing in the APA or *Guernsey* supports such a result.

D. The D.C. Circuit's Novel Textual Justification for the Doctrine Is Unpersuasive

The D.C. Circuit's opinion below does not contain a single citation to the APA, the statute which the court claimed to interpret. Rather, the court offered a novel textual defense of the *Paralyzed Veterans* doctrine, calling the doctrine's "operative assumption" "the belief that a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3, App. 5a (emphasis in original).

This "operative assumption" is flat wrong. A new interpretation leaves the formal regulations unchanged, sitting comfortably in the Code of Federal Regulations in identical form before and after the interpretive shift. Indeed, the D.C. Circuit's assumption defies both logic and common sense. When this Court handed down *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court plainly *changed its interpretation* of the Constitution as applied to racial segregation in schools. No rational observer would say the Court, by overruling *Plessy*, improperly amended the Constitution without following the procedural

requirements outlined in Article V – while simultaneously acknowledging that, absent *Plessy*, *Brown* could stand as a valid interpretation of the Constitution. But it is precisely this curious logic that the D.C. Circuit now believes tethers the *Paralyzed Veterans* doctrine to the text of the APA.

To the extent the D.C. Circuit now believes that any interpretation "closely intertwined" with the underlying regulations becomes a binding legislative rule, the assertion finds no support in the APA or any other authority construing the nearly seventy-year-old Act.

E. The *Paralyzed Veterans* Doctrine Exceeds the Scope of Judicial Review Contemplated by the APA

Although this case can be resolved by reference to the text of the APA and nothing more, the *Paralyzed Veterans* doctrine cannot stand for the additional reason that the doctrine fundamentally conflicts with this Court's precedent addressing the limited scope of judicial authority under the APA.

In a line of cases beginning with *Vermont Yankee*, this Court has held that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." 435 U.S. at 524. Applying *Vermont Yankee* to a revised agency interpretation in *Fox Television*, this Court stated that "[t]he [APA] makes no distinction . . . between

initial agency action and subsequent agency action undoing or revising that action." 556 U.S. at 515. The *Paralyzed Veterans* doctrine contravenes these principles and oversteps the bounds of judicial review contemplated by Congress when it enacted the APA.

1. *Vermont Yankee*

In *Vermont Yankee*, this Court held that the D.C. Circuit erred in invalidating, on the grounds of inadequate procedures, a rule issued by the Nuclear Regulatory Commission. 435 U.S. at 525, 528-30. This Court began with the premise that the APA is "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang Sung*, 339 U.S. at 40). The Court unanimously held that the D.C. Circuit had "seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Id.* at 525. The Court reasoned that section 553 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures[,]" *id.* at 524, and noted that "reviewing courts are generally not free to impose" any "additional procedural rights." *Id.*

Scholars have read *Vermont Yankee* as a rebuke of the D.C. Circuit, which had aggrandized its own authority to establish procedures for agency action at the expense of Congress and the Executive Branch. Then-professor Scalia authored the leading commentary on *Vermont Yankee*. *See* Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345. Justice Scalia called *Vermont Yankee* a "tongue-lashing," made in response to the D.C. Circuit's "progressive evisceration of the APA." *Id.* at 359, 400. He continued: "It does not go too far to say that the D.C. Circuit was in the process of replacing the rudimentary procedural mandates of the Act . . . with a much more elaborate, 'evolving,' court-made scheme . . . ." *Id.* at 359.

The *Paralyzed Veterans* doctrine fits comfortably within Justice Scalia's critique. Here, as in *Vermont Yankee*, the D.C. Circuit has invented a procedural rule unmoored from the text of the APA, "stray[ing] beyond the judicial province to explore the procedural format [and] impos[ing] upon the agency [the court's] own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 370 (quoting *Vt. Yankee*, 435 U.S. at 549).[10]

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[10] More recently, two prominent scholars observed that "[i]n the past several years . . . administrative law has entered a world that is, in important respects, the mirror image of the world before *Vermont Yankee*." Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law* 4 (June 29, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/

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2. *Fox Television*

This Court applied *Vermont Yankee* most recently in *Fox Television*, this time reaffirming the principle that courts may not impose requirements beyond those prescribed in the APA – even where, as here, the agency changes its position. In *Fox Television*, the Court upheld the FCC's changed interpretation of the ban on broadcasting "obscene, indecent, or profane language," 18 U.S.C. § 1464, *see Fox Television*, 556 U.S. at 502. The Second Circuit had invalidated the FCC's changed interpretation, claiming the APA requires "a more substantial explanation for agency action that changes prior policy." *Id.* at 514. But this Court rejected the Second Circuit's approach, pointing out that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515.

This case, of course, directly parallels *Fox Television*. Although *Fox Television* addressed the APA's arbitrary and capricious standard, the *Paralyzed Veterans* doctrine achieves the exact same mistaken

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sol3/papers.cfm?abstract_id=2460822. The authors note that "[t]oday, a determined subset of judges on the D.C. Circuit explicitly . . . seeks to use administrative law to push and sometimes shove policy in libertarian directions, above all through judge-made doctrines that lack solid support in the standard legal sources." *Id.* Calling the *Paralyzed Veterans* doctrine the "most flagrant[ ]" example of this trend, the scholars call for "[a] *Vermont Yankee II* . . . to inscribe into the law the principle that no abstract political theory, whatever its valence, may be elevated into a master-principle of administrative law." *Id.* at 54, 57.

result – rejected in *Fox Television* – under the guise of a procedural rule. But just as *Fox Television* recognized that the arbitrary and capricious standard does not change when applied to a revised interpretation, the APA's procedural requirements do not change when an agency modifies its informal interpretations. Notice-and-comment rulemaking is not required.

Paralyzed Veterans – and the D.C. Circuit's decision below – cannot be reconciled with *Vermont Yankee* or *Fox Television*. Whatever courts may think of the wisdom of agencies revising their informal interpretations, courts may not impose upon agencies additional procedural hurdles beyond those established by Congress. The APA authorizes courts to set aside agency action found to be "without observance of procedure *required by law*," and nothing more. *See* 5 U.S.C. § 706(2)(D) (emphasis added).

II. THE *PARALYZED VETERANS* DOCTRINE UNDERMINES THE CAREFUL BALANCE STRUCK BY CONGRESS

There are sound reasons to believe that Congress said what it meant and meant what it said when it exempted all interpretive rules from notice and comment.

The enactment of the APA followed an unprecedented ten-year period of "painstaking and detailed study and drafting." Comm. on the Judiciary, *Administrative Procedure Act*, H.R. Rep. No. 79-1989, at 241 (2d Sess. 1946). No detail passed unexamined, as

President Roosevelt's opponents and supporters sparred in "a pitched political battle for the life of the New Deal" itself. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560 (1996).

The resulting Act represented a grand legislative bargain, a painstaking balance factoring in agency flexibility, efficiency, time, and resources on the one hand, and predictability, process, notice, and participation for regulated communities on the other. As this Court recognized long ago, "[c]ourts upset that balance when they override informed choice of procedures and impose obligations not required by the APA." *Chrysler Corp.*, 441 U.S. at 313.

The *Paralyzed Veterans* doctrine upsets the APA's careful balance in two important respects. First, the doctrine ignores numerous existing safeguards, including arbitrary and capricious review, statutory safe harbors, and due process, that protect regulated communities from unfair and arbitrary shifts in agency interpretation. Second, the *Paralyzed Veterans* doctrine creates serious negative consequences Congress sought to avoid. The doctrine prevents agencies from correcting obvious mistakes, chills the informal dialogue between government and regulated groups, creates perverse incentives for agencies to issue vague regulations, and increases the costs and administrative burden on agencies, businesses, and citizens.

A. The Law Affords Numerous Checks on Arbitrary and Unfair Shifts in Agencies' Positions

Paralyzed Veterans is perhaps best understood as an expression of judicial disapproval of agency flip flops. But *Paralyzed Veterans* ignores the numerous tools in the judicial toolbox that protect regulated communities from unfair and arbitrary shifts in agency interpretation.

Ironically, once these tools are taken into account, the *Paralyzed Veterans* doctrine, by its own force, only serves to prevent agencies from correcting their own mistakes.

1. Arbitrary and capricious review

First, an agency that wishes to change its interpretation "must show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. Absent a good reason for the shift, the APA authorizes courts to strike down the revised interpretation as "arbitrary" or "capricious." *See* 5 U.S.C. § 706(2)(A); *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

To pass muster under the APA's arbitrary and capricious standard, "the agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'" *Fox Television*, 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in the judgment). Importantly, agencies must address any

reliance interests upset by the interpretive shift. *Id.* at 515 (majority opinion); *id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment).

Congress incorporated arbitrary and capricious review into the APA as the principal vehicle available to parties claiming to be harmed by an agency's changed interpretation: "Unexplained inconsistency is, *at most*, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 46-57).

2. Judicial deference

Second, courts are less likely to defer to an agency's interpretation when the agency's position has been inconsistent.

Under the familiar standard set forth in *Skidmore v. Swift*, an agency's consistency over time is one relevant factor for courts to consider when evaluating an agency's interpretation. The persuasive force of an interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its *consistency with earlier and later pronouncements*." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013) (emphasis added) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The same principle holds true when an agency seeks deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* deference is frequently not warranted "when the agency's interpretation conflicts with a prior interpretation," because such a change provides "reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) and *Auer*, 519 U.S. at 462).[11]

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[11] This Court is no stranger to cases involving shifting agency interpretations. In evaluating changed interpretations – none of which was the product of notice-and-comment rulemaking – this Court has never strayed from its multifactor, totality-of-the-circumstances analysis. *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009) (noting that a "change in interpretation alone presents no separate ground for disregarding [the] Department's present interpretation" (citations omitted)); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008) (holding that where the agency changed its interpretation, "the degree of deference might be reduced by the fact that the agency's earlier position was different"); *id.* at 338 n.8 (Ginsburg, J., dissenting) (same); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (directing courts to consider "consistency" as one factor when evaluating the persuasiveness of an agency's position when confronted with a changed interpretation); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (according "considerably less deference" to a revised agency interpretation); *Watt*, 451 U.S. at 272-73 (concluding that where an agency changed its interpretation, "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference");

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Under either standard, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (citing *Watt*, 451 U.S. at 273).

3. Consistency with the underlying regulations

Third, an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations. Thus, while agencies may replace one reasonable interpretation with another reasonable interpretation, courts must set aside as "contrary to law" any new "interpretation" that conflicts with the underlying legislative rules. *See* 5 U.S.C. § 706(2)(A); *Guernsey*, 514 U.S. at 100. Agencies may not, "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Chase*

Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142-43 (1976) (considering conflicting interpretive guidance from the agency as one factor in determining the appropriate deference to accord the agency's latest interpretation).

The *Paralyzed Veterans* doctrine stands in tension with these decisions and many others. Although an agency's shift in interpretation is *one factor* to consider in evaluating the interpretation's weight, the D.C. Circuit's per se rule makes one factor – a changed interpretation – wholly dispositive of an interpretation's validity.

Bank USA, 131 S. Ct. at 882 (citing *Christensen*, 529 U.S. at 588).[12]

4. Statutory safe harbors

Fourth, Congress has created numerous safe harbors insulating regulated communities from liability when they rely on agency interpretations that are later withdrawn.

Relevant here, section 259 of the Portal-to-Portal Act of 1947 absolves employers from liability for past violations of the FLSA if employers can show they acted in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation." 29 U.S.C. § 259(a). Such a defense, if established, "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative . . . interpretation . . . is modified or rescinded . . . ." *Id.*

Indeed, Congress has created numerous such safe harbors, especially in areas where, as here, the regulations establish legal obligations between private

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[12] Relatedly, even assuming a proposed interpretation is not inconsistent with the regulations, an agency interpretation must actually *interpret* something. An agency may not issue an interpretive rule where the regulation to be interpreted is so broad, vague, or off topic that no reasonable person could ascertain the proposed interpretation beforehand. *See, e.g., Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 168-69, 171-72 (7th Cir. 1996) (Posner, C.J.).

parties enforceable through private litigation. These provisions serve to protect regulated entities that rely in good faith on informal agency guidance. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 57b-4(b); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1640(f); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(e); Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1028; Civil Rights Act, 42 U.S.C. § 2000e-12(b).

Not only do these safe harbor provisions effectively shield innocent parties from liability, they also demonstrate that Congress understood that changes in agency interpretation do happen – an understanding reflected in the plain language of the APA. That understanding stands in deep tension with *Paralyzed Veterans*. If agencies were barred from changing their interpretive rules, and only able to adopt new legislative rules with prospective effect, these statutory safe harbors would serve no purpose whatsoever.[13]

5. Due process

Fifth, due process itself provides a baseline of protection for regulated communities. "A fundamental principle in our legal system is that laws which

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[13] Congress passed the Portal-to-Portal Act just one year after enacting the APA. The Portal-to-Portal Act's provision shielding employers from liability when they rely on an agency's interpretation (even if the interpretation is later revoked) reflects that Congress' understanding that the APA does not categorically prevent agencies from modifying their interpretations.

regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox Television*, 132 S. Ct. at 2317.

In *Fox Television*, this Court's second look at the FCC's new "fleeting expletives" policy, the Court held that the FCC violated due process when the agency sought to sanction two television networks for conduct that occurred before the networks had fair notice of the FCC's new policy. *Id.* at 2230.

While this Court had previously rejected the argument that the APA categorically barred the FCC from adopting its new interpretation, *see Fox Television*, 556 U.S. at 514, the Court three years later concluded that the government could not, consistent with due process, extract fines from private parties for conduct that occurred before the private parties learned of the government's new policy. *See Fox Television*, 132 S. Ct. at 2320.

* * *

The *Paralyzed Veterans* doctrine must be evaluated in context with these firmly-rooted and robust protections. Once existing protections are taken into account, the D.C. Circuit's per se rule has the unfortunate effect of invalidating, by its own force, only interpretations that are consistent with the underlying regulations, thoroughly reasoned, cognizant of the reliance interests of the regulated community, worthy of respect by the courts, and imposed after fair notice – in other words, interpretations that are valid and correct.

The DOL's present loan officer interpretation, which is consistent with the regulations and the DOL's and courts' long-standing position – is precisely such a casualty of the D.C. Circuit's misguided doctrine.

By ignoring existing protections and superimposing a one-size-fits-all procedural requirement, the D.C. Circuit sets up a false choice: require notice and comment every time agencies change their interpretations, or else allow agencies to run roughshod over regulated communities with unchecked power to change course as they see fit. But this is not reality. Existing safeguards place significant hurdles before agencies wishing to change course,[14] protect private parties when agencies do so, and demonstrate that Congress thought long and hard about the consequences of shifting executive policy – balancing common sense protections against needed agency flexibility to change course when appropriate.

Courts honor the balance struck by Congress when they apply the plain language of the APA.

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[14] It is worth noting that the DOL under the Bush administration published 355 opinion letters on its website. *See* Wage & Hour Div., U.S. Dep't of Labor, *Final Rulings and Opinion Letters*, http://www.dol.gov/whd/opinion/opinion.htm (last visited Aug. 4, 2014). Of these interpretations, the Obama administration has revoked only two.

B. The *Paralyzed Veterans* Doctrine Imposes Significant Negative Consequences Congress Sought To Avoid

The *Paralyzed Veterans* doctrine, by requiring notice and comment to modify any definitive interpretation of an agency regulation, also creates significant negative consequences. The doctrine robs agencies of an important source of flexibility, preventing agencies from correcting obvious mistakes. The doctrine also creates perverse incentives for agencies to issue vague regulations, and chills the interpretive dialogue between government, business, and citizen. The doctrine's adverse and unintended consequences ultimately increase the costs and administrative burden on agencies and regulated parties alike.

Congress recognized that agencies must retain some measure of flexibility to adapt their interpretations to ever-changing circumstances. When administering complex regulatory regimes, agencies must resort to flexible interpretive rules to address the "myriad details that are not explicitly resolved by the legislative rules." *See* Pierce, *supra*, at 553-54. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . ." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981 (citations omitted).

This Court has held that "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation

. . . of [a] regulation." *Thomas Jefferson Univ.*, 512 U.S. at 517 (citation and brackets omitted) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)). But by requiring agencies to engage in notice-and-comment rulemaking in order to modify their interpretations, the *Paralyzed Veterans* doctrine denies agencies the flexibility to correct even the most basic mistakes. Imagine, for example, that an agency issues an interpretation but realizes a month later the reasoning was erroneous. Even if no one relied on the initial interpretation, the agency cannot correct course without notice and comment. *Mortg. Bankers Ass'n*, 720 F.3d at 967-68, 970, App. 2a-3a, 9a. Imagine, as a second example, that an agency issues an initial interpretation, but that three district courts disagree with the agency's interpretation, and the agency wishes to adopt the courts' interpretation. *E.g.*, *Burlington Res. Oil & Gas Co. v. U.S. Dep't of Interior*, 21 F. Supp. 2d 1, 3, 5 (D.D.C. 1998). Must the agency continue to fall on its own sword until notice and comment is complete? *Paralyzed Veterans* suggests the agency has no choice. As a third example, imagine an agency with a number of regional offices reviews its policy at a higher level and concludes that the agency must revise an errant interpretation. The *Paralyzed Veterans* doctrine again forbids it. *See Alaska Hunters*, 177 F.3d 1030. Last, imagine that an agency advances a new interpretation for the first time before the United States Supreme Court. *E.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Christopher*, 132 S. Ct. at 2165-66;

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000). It is startling to think the Solicitor General may be violating the APA with some regularity when he presents his arguments to this Court.

In denying agencies the flexibility afforded to them under the APA, the *Paralyzed Veterans* doctrine disrespects the line drawn in the APA between legislative and interpretive rules. Congress recognized that legislative and interpretive rules both serve critical – but separate – functions in the relationship between government and citizen. While legislative rules fill statutory gaps with binding law, *see Chrysler Corp.*, 441 U.S. at 302-03 (citations omitted), interpretive rules constitute the very dialogue between citizen and government about how the government will seek to apply that law, *see, e.g.*, *Guernsey*, 514 U.S. at 99. Because interpretive rules "merely [reflect] the agency's present belief concerning the meaning" of the statutes and regulations administered by the agency, it makes sense that Congress chose not to require notice and comment as a prerequisite to issuing interpretations. *See* Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8, at 27 (1st Sess. 1941).

By effectively collapsing the distinction between legislative and interpretive rules, the *Paralyzed Veterans* doctrine threatens the interpretive dialogue, creating a powerful incentive for agencies to remain silent. Agencies subject to the D.C. Circuit's doctrine will become less transparent, hesitant to provide any informal guidance to the public for fear of having

their informal positions locked in. *Paralyzed Veterans* serves only to "muzzle any informal communications between agencies and their regulated communities – communications that are vital to the smooth operation of both government and business." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.); *cf. Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.) ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.").

At the same time, the *Paralyzed Veterans* doctrine encourages agencies considering new regulations to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher*, 132 S. Ct. at 2168 (citations omitted). Under *Paralyzed Veterans*, an agency can simply issue vague regulations followed by a slew of interpretations, ensuring that the agency's policy choices will bind future administrations. Without *Paralyzed Veterans*, agencies, knowing their interpretive choices may not last, will be encouraged to be as clear as possible in drafting the regulations themselves.

The *Paralyzed Veterans* doctrine needlessly increases the costs and administrative burden on agencies, businesses, and citizens. Notice-and-comment rulemaking is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, *supra*, at 550-51; *see*

also U.S. Gov't Accountability Office, GAO-09-205, *Federal Rulemaking* 5, 19 (2009) (concluding that notice-and-comment rulemaking takes over four years to complete on average). The doctrine has also spawned a wave of *Paralyzed Veterans* litigation, where agencies and private parties endlessly spar over whether, say, an agency enforcement manual published in 1994 conflicts with a Second Circuit amicus brief filed in 2009 – and, if so, whether any of the agency materials qualify as sufficiently "definitive" to invoke the doctrine. *See* Pet'rs' Reply in Supp. of Writ of Cert. 5-8 (citing cases invoking the doctrine).

Not surprisingly, *Paralyzed Veterans* has generated an enormous amount of negative commentary from experts in the field of administrative law. Professor Richard Pierce, widely recognized as the nation's leading administrative law scholar, has written extensively criticizing the doctrine. *See* Pierce, *supra*, at 550-51. Professor Pierce, who has been cited by this Court over forty times, also authored an amicus brief urging reversal in this case. *See* Amicus Curiae Br. of Administrative Law Scholars in Supp. of the Petitions. Seventy-two administrative law scholars signed the brief, and stated that they "are not aware of a single scholar who agrees with the doctrine." *Id.* at 9.[15]

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[15] Other commentary on the *Paralyzed Veterans* doctrine has been similarly scathing. *E.g.*, Sunstein & Vermeule, *supra*,

(Continued on following page)

The *Paralyzed Veterans* doctrine's poor reception by scholars reflects the doctrine's serious negative consequences, consequences that were surely evident when Congress chose to exempt interpretive rules from the APA's notice-and-comment requirement.

III. If This Court Adopts the *Paralyzed Veterans* Doctrine, Mortgage Bankers Cannot Prevail Because the 2006 Opinion Letter Was Not the Product of Notice and Comment

Even if this Court concludes that the *Paralyzed Veterans* doctrine represents the correct interpretation of the APA, Mortgage Bankers' argument is inherently self-defeating. It is undisputed that the DOL's 2006 interpretation, which was the direct

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at 4; William Funk, *A Primer on Legislative Rules*, 53 Admin. L. Rev. 1321, 1329-30 (2001); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 Ecology L.Q. 657, 717-20 (2008); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 807-09 (2001); Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 Colum. L. Rev. 155 (2001); Brian J. Shearer, Comment, *Outfoxing* Alaska Hunters*: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 Am. U. L. Rev. 167 (2012); *see also* Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006); William S. Jordan III, *Interpretive Rules and Statements of Policy – When Do They Constitute Legislative Rules?*, 29 Admin. & Reg. L. News, Fall 2003, at 20; Michael Asimow & Robert A. Anthony, *A Second Opinion? Inconsistent Interpretive Rules*, 25 Admin. & Reg. L. News, Winter 2000, at 16.

result of Mortgage Bankers' lobbying campaign, broke with prior DOL guidance holding that mortgage loan officers do not qualify for the administrative exemption. *See* Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999), App. 75a. At a minimum, the *Paralyzed Veterans* doctrine, assuming it exists, must be applied fairly. The doctrine should not permit a regulated party to attack selectively the agency's most recent interpretive change – particularly where, as here, that same party caused the agency to change its interpretation in the first place.[16]

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[16] *Cf.* Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 467 (1993) (The word "chutzpah" is defined by the paradigmatic example of the child who murders his parents and then begs the court for mercy because he is an orphan.).

CONCLUSION

The *Paralyzed Veterans* doctrine cannot stand. The doctrine is incompatible with the Administrative Procedure Act and unfaithful to the careful balance struck by Congress. Petitioners respectfully ask this Court to reverse the court of appeals.

Respectfully submitted.

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RESPONDENT'S BRIEF

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RECORD AND BRIEFS

Nos. 13-1041, 13-1052

In The

Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF THE DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,

Respondents.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

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QUESTION PRESENTED

Whether notice and opportunity for comment are required where an agency issues an authoritative interpretation of a regulation that squarely conflicts with the same agency's prior authoritative interpretation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Thomas E. Perez, Secretary of Labor, and Jerome Nickols, Ryan Henry, and Beverly Buck.

Respondent is the Mortgage Bankers Association, which has no parent corporation and does not issue stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT	1
A. Background	2
B. Facts and Procedural History	9
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. *PARALYZED VETERANS* PROPERLY ENFORCES THE APA'S MANDATE OF PROCEDURAL FAIRNESS	16
A. A Proper Understanding Of *Paralyzed Veterans* Demonstrates Its Rightful Place In Administrative Law	17
B. *Paralyzed Veterans* Is Faithful To This Court's Functional Approach To The APA	23
C. *Paralyzed Veterans* Promotes Good Government	28
D. *Paralyzed Veterans* Respects The Separation Of Powers	34
II. *PARALYZED VETERANS* PROPERLY CONSTRUES THE APA'S EXEMPTION FOR "INTERPRETIVE RULES"	36

TABLE OF CONTENTS—Continued

Page

A. As Originally Understood, The APA's Exemption For "Interpretive Rules" Does Not Apply To The Agency Action Here 38

B. When An Agency Holds Out Its Own Rule As "Substantive" And "Controlling," Requiring Notice And Comment Does No Violence To The APA 45

CONCLUSION 51

TABLE OF AUTHORITIES

Page

CASES

Abraham Lincoln Mem'l Hosp. v. *Sebelius*, 698 F.3d 536 (7th Cir. 2012) 50

Air Transp. Ass'n of Am. v. *FAA*, 291 F.3d 49 (D.C. Cir. 2002) 20, 30

Alaska Prof'l Hunters Ass'n v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) ..... *passim*

Am. Trucking Ass'n v. *ICC*, 659 F.2d 452 (5th Cir. 1981) 24

Appalachian Power Co. v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000) 45

Ass'n of Am. R.R.s v. *Dep't of Transp.*, 198 F.3d 944 (D.C. Cir. 1999) 20

Auer v. *Robbins*, 519 U.S. 452 (1997) ..... *passim*

Bowles v. *Seminole Rock*, 325 U.S. 410 (1945) 41, 42

Burns v. *Alcala*, 420 U.S. 575 (1975) 38

Caraballo v. *Reich*, 11 F.3d 186 (D.C. Cir. 1993) 39

CFTC v. *Schor*, 478 U.S. 833 (1986) 35

Chief Probation Officers of Cal. v. *Shalala*, 118 F.3d 1327 (9th Cir. 1997) 26, 43

Christensen v. *Harris Cnty.*, 529 U.S. 576 (2000) 23, 24, 48

Christopher v. *Smithkline Beecham Co.*, 132 S. Ct. 2156 (2012) 29

Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 21

TABLE OF AUTHORITIES—Continued

Page

Dia Navigation Co. v. *Pomeroy*, 34 F.3d 1255 (3d Cir. 1994).....17

Dismas Charities, Inc. v. *U.S. Dep't of Justice*, 401 F.3d 666 (6th Cir. 2005).....50

Erringer v. *Thompson*, 371 F.3d 625 (9th Cir. 2004).....50

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009).....24, 25, 26

Geier v. *Honda*, 529 U.S. 861 (2001).....27

Henry v. *Quicken Loans*, 698 F.3d 897 (6th Cir. 2012).....8, 9

Hogan v. *Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004).....4

Hudson v. *FAA*, 192 F.3d 1031 (D.C. Cir. 1999).....30

MetWest Inc. v. *Sec'y of Labor*, 560 F.3d 506 (D.C. Cir. 2009).....30

Morton v. *Ruiz*, 415 U.S. 199 (1974).....21

N.C. Growers' Ass'n v. *UFW*, 702 F.3d 755 (4th Cir. 2012).....15, 34

Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005).....27, 28

Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. *Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).....21

Nat'l Min. Ass'n v. *McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).....50

TABLE OF AUTHORITIES—Continued

Page

Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) ..... *passim*

Perrin v. *United States*, 444 U.S. 37 (1979) 38

SBC Inc. v. *FCC*, 414 F.3d 486 (3d Cir. 2005) 49

Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 19, 22, 24

Shell Offshore Inc. v. *Babbitt*, 238 F.3d 622 (5th Cir. 2001) 21, 50

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 39

Talk Am., Inc. v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011) 33, 35

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 27

Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) 24, 25, 26, 27

Wilshin v. *Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002) 4

STATUTES

Administrative Procedure Act

5 U.S.C. §§ 551-559 ..... 2, 9

5 U.S.C. § 551 37

5 U.S.C. § 553 ..... *passim*

5 U.S.C. §§ 701-706 9

TABLE OF AUTHORITIES—Continued

Page

Fair Labor Standards Act

29 U.S.C. §§ 201-219 2

29 U.S.C. § 207 2

29 U.S.C. § 213 ..... 2, 5, 48, 49

RULES AND REGULATIONS

29 C.F.R. § 541.200 ..... 3, 7

29 C.F.R. § 541.203 ..... 3, 4, 5

1935 SEC LEXIS 378, Rule LA2 41

OTHER AUTHORITIES

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974) 28

THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961) 34

Updating & Modernizing Overtime Regulations, 79 Fed. Reg. 15,209 (Mar. 18, 2014) 12

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 16, 30, 41, 43

STATEMENT

For nearly two decades, the D.C. Circuit has held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the Administrative Procedure Act] without notice and comment," as established in *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (Randolph, J.). This rule—known as the *Paralyzed Veterans* doctrine—enforces the mandate of the Administrative Procedure Act (APA) that substantive rules promulgated by agencies must go through notice-and-comment rulemaking. 5 U.S.C. § 553.

To ensure fairness and rationality in rulemaking, the *Paralyzed Veterans* doctrine prevents an agency from abruptly abandoning its prior, authoritative interpretation without at least providing the regulated community with notice and an opportunity to be heard. The doctrine also strengthens the rule of law by giving agencies the choice between interpreting their own regulations consistently, or changing those interpretations transparently. Without *Paralyzed Veterans*, an agency—such as the Department of Labor in this case—can impose liability for the very thing it previously approved and announced to the world that its rule permitted. Neither the text of the APA, nor this Court's cases, nor sound public policy

supports, much less requires, such a result. The judgment below should be affirmed.

A. Background

This administrative law case arises in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Employers covered by the FLSA must pay overtime wages to employees who work more than 40 hours per week, unless the employees are exempt. 29 U.S.C. § 207(a)(1). Section 13(a) of the FLSA exempts from those overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity[,] * * * or in the capacity of outside salesman," as those terms are "defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551-559]." 29 U.S.C. § 213(a)(1). These are the "white-collar exemptions."

In 1940, the Department of Labor promulgated regulations defining the administrative exemption as applying to employees who, among other things, perform work "directly related to management policies or general business operations." 5 Fed. Reg. 4077 (1940). In 1949, the Department revised this requirement to provide that an administratively exempt employee is one "[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his

employer's customers." 14 Fed. Reg. 7705, 7706 (1949). This definition remained unchanged for over 50 years.[1]

In 2004, after engaging in notice-and-comment rulemaking, the Department issued revised regulations addressing various FLSA exemptions, including the administrative exemption. The 2004 regulations retained the 1949 "primary duty" test without change: an administratively exempt employee is still one whose "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2).

The 2004 regulations included a new section (29 C.F.R. § 541.203) giving examples of administratively exempt employees. These examples included "employees in the financial services industry," whose "duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial

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[1] The administrative exemption also requires that the employee be paid at least $455 per week (on a salary or fee basis), and that his primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200. Those requirements are not at issue in this case.

products; and marketing, servicing or promoting the employer's financial products." 29 C.F.R. § 541.203(b).

An employee "whose *primary duty* is selling financial products does not qualify for the administrative exemption." *Ibid.* (emphasis added). But as the Department repeatedly made clear in the preamble to the 2004 regulations, the administrative exemption can still apply even if employees also do some selling to consumers. See *Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees*, 69 Fed. Reg. 22,122, 22,146 (2004).

For example, the Department noted approvingly that the Eleventh Circuit has held that insurance agents are exempt employees "even though they also sold insurance products directly to existing and new customers." *Ibid.* (citing *Hogan* v. *Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004)). The Department also cited with approval a district court decision holding that "selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—[is] not enough of a distinction to negate [an employee's] exempt status." *Ibid.* (citing *Wilshin* v. *Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1377-79 (M.D. Ga. 2002)).

The Department explained that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." *Ibid.* Specifically, the Department clarified that "servicing existing customers, promoting

the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment" such that the administrative exemption applies. *Ibid.*

In September 2006, the Department issued an administrator opinion letter in response to an inquiry by respondent Mortgage Bankers Association regarding the status of mortgage loan officers under the 2004 regulations. Pet. App. 70a-84a. The Department determined that because loan officers qualify as exempt employees under Section 13 of the FLSA, they are not owed overtime payments in addition to their salaries. *Ibid.* That opinion was signed by the Administrator of the Wage and Hour Division, published on the Department's website, and held out to employers as the Department's definitive interpretation of its regulations. *Ibid.*

Specifically, the Department determined that mortgage loan officers typically perform administratively exempt duties. *Id.* at 83a. The Department first cited the examples provided in the 2004 regulations, noting that they specifically include "'[e]mployees in the financial services industry.'" *Id.* at 76a (citing 29 C.F.R. § 541.203(b)). The Department further noted that the cases cited in the preamble to the 2004 regulations hold that "many financial services employees qualify as exempt administrative employees, even if

they are involved in some selling to customers." *Id.* at 77a (quoting 69 Fed. Reg. at 22,146). The Department explained:

> The description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Id. at 78a.

Thus, "[s]imilar to the employees" in the cases cited in the 2004 preamble—"all of whom were found to satisfy the duties requirements of the administrative exemption—the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products." *Id.* at 79a (citations omitted). The Department concluded that the "mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer." *Ibid.*[2]

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[2] The Department further concluded that the mortgage loan officers met the other requirements for the administrative exemption, including that they exercise discretion and independent

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Four years later, in March 2010, the Department abruptly announced that going forward, it would sharply limit the use of opinion letters and instead rely on *sua sponte* "administrator interpretations" as the Department's primary vehicle for interpreting the pertinent statutes and regulations. The first administrative interpretation ("AI 2010-1") dealt with mortgage loan officers. *Id.* at 49a. The Department issued AI 2010-1 with no prior notice and no opportunity for public comment.

AI 2010-1 withdrew the 2006 opinion letter—which determined that employees who perform the typical job duties of a mortgage loan officer are administratively exempt under the FLSA—and concluded just the opposite. *Id.* at 68a-69a. The typical job duties of mortgage loan officers set forth in the administrative interpretation were the same ones that the Department relied upon in its 2006 opinion letter reaching the opposite conclusion. Compare *id.* at 50a-51a, with *id.* at 72a-73a.

Although the Department previously found those same job duties to constitute work "directly related to the management or general business operations of their employer or their employer's customers," *id.* at 75a (quoting 29 C.F.R. § 541.200(a)(2)), and thus qualify for the administrative exemption, the Department now declared that those same job duties "do

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judgment with respect to matters of significance. Pet. App. 83a. Again, those requirements are not at issue in this case.

not relate to the internal management or general business operations of the company." *Id.* at 64a. The Department rejected what it called an "inappropriately narrow definition of sales" in its 2006 opinion, *id.* at 59a-60a n.3, and criticized what it now viewed as a "misleading assumption and selective and narrow analysis." *Id.* at 68a. The AI 2010-1 did not mention or discuss any of the cases in the 2004 Preamble dealing with employees who are administratively exempt yet still sell products for their employer. 69 Fed. Reg. at 22,145.

In a 2010 *amicus* brief, the Department acknowledged that its recent administrative interpretation was not "merely a clarification of a regulation." Rather:

> [AI 2010-1] unambiguously represents a *substantive* change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.

Br. of *Amicus* The Secretary of Labor at 27-28, *Henry* v. *Quicken Loans*, 698 F.3d 897 (6th Cir. 2012) (No. 2:04-cv-40346 (E.D. Mich. Dec. 9, 2010), ECF No. 609) ["DOL *Amicus* Brief"] (emphasis added). That "substantive change," argued the Department, "is entitled to controlling deference" under *Auer* v. *Robbins*, 519 U.S. 452 (1997). *Ibid.*

B. Facts and Procedural History

Respondent Mortgage Bankers Association filed a complaint in the district court alleging that the Department violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, in issuing the administrative interpretation. Pet. App. 4a.

The Association's complaint relied upon the D.C. Circuit's tandem of decisions in *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (Silberman, J.), and *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) (Randolph, J.), which together stand for the proposition that where, as here, "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Id.* at 1034.

The parties filed cross-motions for summary judgment. After briefing closed, three former mortgage loan officers who sued their previous employer for overtime pay after the Department withdrew the 2006 interpretive opinion moved to intervene in the case. The district court granted the motion, and the private party intervenors filed their own summary judgment brief.[3]

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[3] Private party intervenor Henry's overtime claim was rejected by a jury in March 2011, and that verdict was affirmed by the Sixth Circuit in 2012. *Henry*, 698 F.3d at 902. Henry's remaining interest in this litigation—and thus his standing

(Continued on following page)

The district court granted summary judgment to petitioners, ruling (as pertinent here) that the Association could not rely upon *Paralyzed Veterans* because it could not "satisfy the reliance component of the *Paralyzed Veterans* doctrine." Pet. App. 41a-42a. In reaching that conclusion, the district court rejected the Association's argument that even assuming reliance was a freestanding requirement of the doctrine, the Association satisfied any such requirement because its members relied heavily upon the 2006 opinion letter. As the Association pointed out, shortly after the Department issued the AI 2010-1 withdrawing the 2006 opinion letter, the Association's members soon found themselves embroiled in litigation by mortgage loan officers (like the private-party intervenors in this case) claiming that, based on the AI 2010-1, they were wrongly classified as administratively exempt and were entitled to damages as a result.

The D.C. Circuit reversed. Writing for a unanimous panel (Tatel and Brown, J.J., and Sentelle, S.J.), Judge Brown began by articulating the "straightforward rule" announced by the "tandem" of *Paralyzed Veterans* and *Alaska Hunters*: "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." Pet. App. 2a. (citing *Alaska Hunters*, 177 F.3d at

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before this Court—is suspect. See Br. in Opposition to *Certiorari* 10 n.4.

1034). Noting that the sole issue before the court—whether reliance is "a 'separate and independent requirement'" of the *Paralyzed Veterans* doctrine—was a "narrow one," the court held that reliance is "just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive." *Ibid.*

Because the government "conceded the existence of two definitive—and conflicting—agency interpretations," and "acknowledged at oral argument" that the Association would prevail if "the only reason [courts] look to reliance is to find out if there is a definitive interpretation," *id.* at 3a, the court reversed and remanded with instructions to vacate AI 2010-1. *Ibid.* The court made clear that if the Department "wishes to readopt the later-in-time interpretation, it is free to do so. We take no position on the merits of their interpretation. [The Department] must, however, conduct the required notice and comment rulemaking." *Ibid.*

The court noted that "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." *Id.* at 6a n.4 (citing government's brief "counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions"). Indeed, the court reasoned, "*Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

The private party intervenors (but not the government) unsuccessfully sought rehearing *en banc*. Pet. App. 85a. On remand, the district court issued an order vacating AI 2010-1.

The government and the private party intervenors filed petitions for *certiorari*. Shortly afterward, the President directed the Secretary of Labor to "propose revisions to modernize and streamline the existing overtime regulations." Presidential Memorandum, *Updating & Modernizing Overtime Regulations*, 79 Fed. Reg. 15,209 (Mar. 18, 2014). White House officials told reporters the new rulemaking will address the status of "loan officers."[4]

This Court granted *certiorari*.

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[4] Michael D. Shear & Steven Greenhouse, *Obama Will Seek Broad Expansion of Overtime Pay*, N.Y. Times, Mar. 11, 2014, www.nytimes.com/2014/03/12/us/politics/obama-will-seek-broad-expansion-of-overtime-pay.html?_r=0. Because notice-and-comment rulemaking will be required regardless of the outcome of this case, the Association argued in opposing *certiorari* that the case is moot. Br. in Opposition to *Certiorari* 12-13. In its reply (at 4), the government implied that the rulemaking will not address the provisions at issue in this case. Subsequent events may confirm that the case is moot or that the petitions should be dismissed as improvidently granted.

SUMMARY OF ARGUMENT

The *Paralyzed Veterans* doctrine serves a vital role in administrative law. Its insistence on APA notice-and-comment procedures prevents agencies from unseemly flip-flopping once they have definitively interpreted their own regulations. Otherwise, an agency could exclude the regulated community entirely from its deliberations and undermine both reliance interests and the APA's mandate for procedural fairness in agency dealings. Nothing in the APA's text, this Court's cases, or sound public policy supports, much less requires, such an unfortunate result.

This case exemplifies the importance of the doctrine. Under the Department's regulations as the Department itself interpreted them in the 2006 opinion letter, employers of loan officers were not liable for overtime, and loan officers were not entitled to overtime. When the Department *sua sponte* amended that definitive interpretation, however, employers of loan officers were immediately liable for overtime (unless some other exemption applied). Before an agency can so dramatically change course as to what its own regulation means—and effect a change that imposes liability where before there was none—*Paralyzed Veterans* simply requires the agency to provide notice and an opportunity to comment.

Petitioners make no real effort to demonstrate that AI 2010-1 actually falls within the APA's exclusion of "interpretive rules" from the general requirement of notice-and-comment procedures. Petitioners

simply assert that AI 2010-1 is an "interpretive rule" exempt from APA notice and comment: Q.E.D. That is not so, however, for two primary, independent reasons: (1) The Department, in issuing AI 2010-1, substantially altered its prior definitive interpretation of the 2004 regulations, thereby effectively amending the regulation itself; and (2) The Department, in holding out AI 2010-1 as "controlling," "substantive," and entitled to *Auer* deference, has made plain that AI 2010-1 has the force of law, is legislative in effect, and is thus invalid without notice and comment.

Under either rationale, the D.C. Circuit's judgment that the Department was required to engage in notice and comment before issuing AI 2010-1 should be affirmed. Where, as here, an agency substantially alters a definitive interpretation of its own regulation—and then holds out the new interpretation as "controlling" and "substantive"—the APA's exemption for "interpretive rules" does not allow the agency to evade the APA's notice-and-comment requirements. That conclusion finds strong support in what Congress originally understood an "interpretive rule" to be when it enacted the APA and chose to exempt such rules from notice and comment. It is fully consistent with this Court's cases, which take a functional approach to the APA and look at the substance and effect of agency action—not its form or label. And it furthers critically important policies of good government all the while respecting separation of powers principles.

No one disputes that elections have consequences. Different administrations will naturally have different priorities and policy views when it comes to administrative agencies. But as Judge Wilkinson has observed, the APA "requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *N.C. Growers' Ass'n* v. *UFW*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). "Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow." *Ibid.*

Paralyzed Veterans helps ensure that substantial changes in the rules governing regulated entities are accomplished with "at least some fidelity to law and legal process" by requiring notice and comment. In doing so, *Paralyzed Veterans* does not simply protect legitimate reliance interests. It also enforces the APA's mandate of procedural fairness and protects the common-sense values of government transparency and accountability. Particularly in a world where courts afford controlling deference to agencies' own interpretations of their regulations, *Paralyzed Veterans* is critical. If an agency like the Department of Labor claims controlling deference for its interpretation on the back end, it is hardly untoward to require the Department to go through notice and comment on

the front end. The judgment of the D.C. Circuit should be affirmed.

ARGUMENT

Petitioners' primary argument is that *Paralyzed Veterans* is inconsistent with the text of the APA, which exempts "interpretive rules" from its general notice-and-comment requirements. 5 U.S.C. § 553(b). But where, as here, an agency abrogates its own definitive interpretation of a regulation, that agency action "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing novel procedural requirements not found in the APA, *Paralyzed Veterans* correctly insures that agencies comply with the APA—which, after all, seeks to establish procedural fairness in agency dealings. That purpose would be directly contravened if *Paralyzed Veterans* were abandoned. The Court should decline petitioners' invitation to do so and affirm the judgment below.

I. *PARALYZED VETERANS* PROPERLY ENFORCES THE APA'S MANDATE OF PROCEDURAL FAIRNESS

The overriding goal of the Administrative Procedure Act is to establish procedural fairness in agency dealings. See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 9 (1947)

[*Attorney General's Manual*]. Notice-and-comment rulemaking is generally required by the APA because, among other things, it "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994) (quotations omitted).

The D.C. Circuit's *Paralyzed Veterans* doctrine plays a critical role in enforcing the APA's mandate of procedural fairness by restraining agencies from abruptly changing positions without at least providing notice and an opportunity to comment on the contemplated agency action. In a world without *Paralyzed Veterans*, agencies could adopt definitive interpretations of their own regulations—interpretations that not only tend to foster reliance interests but are also intended to do so—and then, without notice or opportunity for the regulated community to comment, alter those interpretations dramatically. This Court should decline petitioners' invitation to discard that sound doctrine and remove a critical check on agency overreach.

A. A Proper Understanding Of *Paralyzed Veterans* Demonstrates Its Rightful Place In Administrative Law

The D.C. Circuit first applied the *Paralyzed Veterans* doctrine in *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999). There, fishing and hunting guides from Alaska—who necessarily

flew small planes to reach remote areas—challenged a new FAA rule, issued without notice and comment, forcing the guides to comply with regulations for commercial airline pilots. *Id.* at 1030-31. The new interpretation was contrary to decades of agency advisement that the guides were exempt from the commercial pilot restrictions. *Ibid.*

The D.C. Circuit invalidated the agency's new interpretation because it effected a wholesale change in the agency's prior interpretation—made definitive over the course of years of consistent application—that effectively amended the regulation itself, and thus required the agency to provide an opportunity for notice and comment before making the substantive change. *Id.* at 1036. Writing for the court, Judge Randolph emphasized that "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Id.* at 1035 (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)).

The rule applied by the *Alaska Hunters* court was first set out in *Paralyzed Veterans*, which involved an agency guideline for wheelchair access related to the Americans with Disabilities Act. The "most powerful argument" against the agency, Judge Silberman explained in writing for the court, was "that the Department of Justice's present interpretation of the regulation constitutes a fundamental modification of its previous interpretation" and thus should have been made only after notice and comment. *Id.* at 586.

Judge Silberman explained the rationale for such a rule:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with * * * existing regulations."

Paralyzed Veterans, 117 F.3d at 586 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).

The *Paralyzed Veterans* court ultimately held that the agency's prior interpretation—which was contained in a speech by "a mid-level official of [the] agency"—was "not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position." *Id.* at 587 (quoting *Auer*, 519 U.S. at 452). Thus the D.C. Circuit set out the doctrine and its requirements in *Paralyzed Veterans*, but did not actually apply the doctrine to invalidate agency action until *Alaska Hunters*.

For more than 15 years since then, *Paralyzed Veterans* has prevented agencies from unilaterally and substantially altering definitive interpretations of their regulations. The vital role played by the

doctrine is by no means diminished because courts have only rarely applied it to invalidate agency action. Rather, as Judge Brown noted in her opinion in this case, "[i]t need not reflect poorly on the doctrine that so few of our cases have taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking." Pet. App. 6a n.4. That is because "*Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance." *Ibid.*

It is also because the criteria for invoking the doctrine are substantial. First, if the previous agency interpretation was not definitive or authoritative, *Paralyzed Veterans* will not apply. *Ass'n of Am. R.R.s* v. *Dep't of Transp.*, 198 F.3d 944, 948 (D.C. Cir. 1999). Second, if there is no "significant revision" to the rule in question, *Paralyzed Veterans* will not apply. *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 58 (D.C. Cir. 2002). Here the government has conceded that both prongs of the doctrine are satisfied. Pet. App. 3a.

Perhaps most important, the doctrine's limitations are firmly rooted in the APA itself. No one disputes that the APA requires notice and comment before an agency can amend a regulation. *Paralyzed Veterans* simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself—and the APA requires notice and comment

before an agency can do that. See, e.g., *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) ("If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.").

Paralyzed Veterans also reflects the reality that definitive interpretations take on the force of law—which is the touchstone of "legislative" or substantive rules—because they bind parties moving forward and alter individual obligations, as here, for example, where employers of loan officers now face liability to private parties on the basis of AI 2010-1 where there was none before. See, e.g., *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule,'—as one 'affecting individual rights and obligations.' This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'" (citing *Morton* v. *Ruiz*, 415 U.S. 199, 232, 236 (1974))).

To be sure, an agency is initially permitted to interpret an ambiguous regulatory provision—and entitled to deference—because the agency has the expertise needed to clarify the ambiguity. But once clarified by a definitive interpretation, such as the 2006 Administrator Opinion Letter, the regulation is no longer ambiguous—and the definitive interpretation becomes part of that regulation itself. See, e.g., *Nat'l Family Planning & Reproductive Health Ass'n,*

Inc. v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) ("'If the courts accept the agency's interpretation, it becomes a part of the statutory law without any formally legislative action on the part of the agency.' (quoting Robert A. Anthony, *'Well, You Want the Permit Don't You?' Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 38 (1992)). Courts must therefore be wary not to accord this elevated status too easily to agency missives unless it is clear that the rule is merely interpretative and therefore already implicitly part of the statute or regulation.").

Thus, when an agency tries—as the Department did here—to reverse a definitive interpretation, it is impermissibly seeking to adopt a new position wholly inconsistent with the regulation without the notice and opportunity to comment required by the APA. See, e.g., *Guernsey*, 514 U.S. at 100 ("We can agree that APA rulemaking would still be required if [Provider Reimbursement Manual] § 233 adopted a new position inconsistent with any of the Secretary's existing regulations."). That is why an initial interpretation that may fall within the exception to notice and comment in § 553(b)(A) cannot be reversed without notice and comment.

Of course, if an agency has issued various interpretations of its own regulation that are reasonably viewed as consistent, there has been no change (or amendment) to the regulation (and *Paralyzed Veterans* would not apply). But if the change is a substantial one—like the Department's admitted 180° reversal

here—the agency has effectively amended the regulation because the same agency charged with issuing, interpreting, and enforcing the same regulation has said that it now means something completely different than what the agency said it meant before. This is not to say that an agency can never change its mind. It is simply to say that under these circumstances, it cannot do so without affording notice and an opportunity to comment. Properly understood, then, *Paralyzed Veterans* performs a vital function in enforcing the APA's mandate of procedural fairness and uniformity by preventing the exception to APA notice-and-comment rulemaking for interpretive rules from swallowing the rule itself.

B. *Paralyzed Veterans* Is Faithful To This Court's Functional Approach To The APA

As set out above, the *Paralyzed Veterans*' doctrine—not petitioners' crabbed interpretation of the APA—is fully consistent with this Court's cases. In *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), for example, this Court recognized that deferring to what the agency called an "interpretation" of an unambiguous regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." The imposter "interpretation" in *Christensen* was not an interpretation at all, and thus the agency could not avoid notice-and-comment procedures by cloaking its actions

in the mantle of mere "interpretation." *Ibid.* The same thing is true here, where *Paralyzed Veterans* similarly prevents agencies from engaging in "*de facto*" amendments to regulations without notice and comment.

Similarly, in *Guernsey*, this Court "agree[d] that APA rulemaking would still be required if [the interpretive rule at issue] adopted a new position inconsistent with any of the Secretary's existing regulations." 514 U.S. at 100. Notice and comment was unnecessary in that case only because the rule in question did not effect "a substantive change in the regulations." *Ibid.* The necessary implication is that interpretations effecting substantive changes—like AI 2010-1—do require notice and comment. That is because they are the functional equivalent of amendments to regulations. The agency's characterization of its own action is, of course, not determinative of the inquiry. See, e.g., *Am. Trucking Ass'n* v. *ICC*, 659 F.2d 452, 471 (5th Cir. 1981) ("[W]hat professes to be mere guideline, * * * is instead a rule to which all must conform.").

Petitioners, however, insist that *Paralyzed Veterans* disregards this Court's teaching in cases such as *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), and *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), that the APA specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking." *Vermont Yankee*, 435 U.S.

at 524. This misses the point, though, that *Paralyzed Veterans* does not impose any extrinsic procedures of its own. It merely safeguards the procedural requirements at the heart of § 553: notice and opportunity for public comment.

In *Vermont Yankee*, this Court reviewed a D.C. Circuit decision that imposed procedures on the agency beyond the APA, such as those required in a full adjudicatory hearing. See *id.* at 547-48. This Court reversed, holding that the procedures were beyond the APA's scope, but acknowledging that circumstances could "justify a court in overturning agency action because of a failure to employ procedures beyond those required by the [APA]." *Id.* at 524. *Paralyzed Veterans* does not go so far, though. It only asks for the procedures provided in the APA itself when an agency takes the dramatic step of overturning its own definitive interpretation of a regulation.

When an agency does that, it "should be regarded * * * as having actually 'amended' its regulation without notice and comment in contravention of section 553." *Paralyzed Veterans*, 117 F.3d at 586. Far from imposing new procedural requirements not found in the APA, *Paralyzed Veterans* correctly ensures that agencies comply with the APA, thereby keeping faith with *Vermont Yankee*.[5]

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[5] This Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), is inapposite for the same reasons. In that case, the Court was concerned with whether the

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That conclusion finds further support in *Chief Probation Officers of California* v. *Shalala*, 118 F.3d 1327 (9th Cir. 1997), written by Justice White—who joined the *Vermont Yankee* opinion in full—sitting on the Ninth Circuit panel by designation. In *Chief Probation Officers*, Justice White rejected the view—advanced by petitioners here—"that every rule interpreting a statute or regulation need not provide for notice and comment." *Id.* at 1333 n.6.

Interpretive rule changes sometimes require notice and comment, Justice White reasoned, when they modify other rules "having the force of law." *Ibid.* The rules at issue, however, were merely "short-lived" interpretations of the governing statute that did not have the force of law. *Id.* at 1334. Justice White fully agreed with the *Paralyzed Veterans* doctrine—he simply concluded its prerequisites had not been satisfied in that particular case. That a member of the unanimous *Vermont Yankee* Court could later adopt the *Paralyzed Veterans* doctrine in

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explanation provided by an agency for a policy shift in the context of adjudications could survive arbitrary-and-capricious review, and held that it could. Here, the issue is whether the APA requires notice and comment as a purely procedural matter. Thus *Fox* presents a conflict only if one assumes the very thing at issue here—whether *Paralyzed Veterans* is somehow imposing procedures beyond those required by the APA. As demonstrated above, *Paralyzed Veterans* does no such thing, so the claimed conflict with *Fox* is illusory.

full only confirms that *Vermont Yankee* and *Paralyzed Veterans* are perfectly compatible.[6]

Petitioners also point to this Court's decision in *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 517 (1994), as a source of conflict with *Paralyzed Veterans*, but that is incorrect. While the Court acknowledged—in *dicta*—an agency's ability to change its mind on an interpretation, the Court was clear that unlike here, there was no "persuasive evidence that the Secretary has interpreted the * * * provision in an inconsistent manner." *Id.* at 515.

To be sure, "[a]n agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on a continuing basis * * * *" *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted). *Paralyzed Veterans* is not to the contrary.

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[6] Justice Stevens also cited *Paralyzed Veterans* with approval in his dissent in *Geier* v. *Honda*, writing that "the APA's requirement of new rulemaking [applies] when an agency substantially modifies its interpretation of a regulation." 529 U.S. 861, 912 (2001) (Stevens, J., dissenting) ("Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking—whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent—respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation." (citing *Paralyzed Veterans*)).

The interpretation at issue in *National Cable* was itself the product of notice-and-comment rulemaking. *Id.* at 977 ("[After two years], that rulemaking culminated in the *Declaratory Ruling* under review in these cases."). No one disagrees that an agency should be free to revise substantive interpretations through thoughtful analysis. There is no basis in this Court's cases, however, for excluding the regulated community from that process under the guise of engaging in "interpretive" rulemaking exempt from notice and comment.

C. *Paralyzed Veterans* Promotes Good Government

Like the APA itself, the fundamental goal of the *Paralyzed Veterans* doctrine is basic fairness. As Judge Randolph put it in *Alaska Hunters*, "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" 177 F.3d at 1035 (quoting Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)); see also Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1974) (commenting that the APA's notice-and-comment process was designed to be "a genuine interchange" with affected parties, rather than "mere bureaucratic sport"). That concern is relevant not only to protecting the legitimate reliance interests of those regulated by administrative agencies, but also to vindicating the interest of every citizen in promoting accountable, transparent

government. See, e.g., Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 954 (1997) ("The [APA] was a historic compromise. It signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints * * * *").

As this Court has recently explained, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable * * * *" *Christopher* v. *Smithkline Beecham Co.*, 132 S. Ct. 2156, 2168 (2012). *Paralyzed Veterans* has the salutary effect of protecting industry reliance interests and, at a minimum, gives regulated entities notice of impending changes to the regulations under which they must operate. That is why petitioners' arguments for discarding *Paralyzed Veterans* are so unpersuasive.

Petitioners primarily complain that *Paralyzed Veterans* interferes with needed agency "flexibility." Government Br. at 20-27; Intervenors' Br. at 49-54. But that argument proves too much. In enacting the APA, Congress selected notice and comment as the default rule. It is just as illegitimate to allow agencies to evade that rule as it is to impose process that the APA does not require. If anything, the selection of notice and comment as the default suggests that Congress was less concerned with agency flexibility than it was with procedural fairness and uniformity.

See *Attorney General's Manual* 9. In all events, petitioners' concerns are overblown—particularly when one considers that the doctrine creates no more additional "difficulty" for agencies than what Congress originally envisioned in setting notice-and-comment rulemaking as the default rule for agency action in the first place.

Further, as demonstrated above, concerns that the *Paralyzed Veterans* doctrine inappropriately limits agency flexibility are misplaced given the inherent, significant limitations on the doctrine's application: It only applies to invalidate agency action when the agency—after issuing a definitive and authoritative interpretation—significantly revises that interpretation. And if an agency's subsequent interpretation "'can reasonably be interpreted' as consistent with prior [interpretations], it does not significantly revise a previous authoritative interpretation." *MetWest Inc.* v. *Sec'y of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009) (quoting *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 57-58 (D.C. Cir. 2002)).

Those limitations prevent fickle agency flip-flopping on established positions. They do not create insurmountable hurdles for run-of-the-mill course corrections. See, e.g., *Hudson* v. *FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999) (holding that FAA interpretation did not require notice-and-comment procedures because it was simply an "application of the regulation to a changed situation which calls for a different policy"). But if an issue is significant enough to warrant wholesale changes to the substance of a rule,

it is significant enough to be considered through APA procedures or resolved with the "good cause" exemption—5 U.S.C. § 553(b)(B)—for bypassing those procedures. To the extent agency flexibility is needed, the APA has already provided it.

What is more, as the D.C. Circuit recognized in its opinion, Pet. App. 6a, facts giving rise to the application of *Paralyzed Veterans* do not occur very often. While the government now speculates (at 25-26) about the potential *in terrorem* effect of the doctrine, this is a new-found concern. The government took the position in the court of appeals that under *Paralyzed Veterans*, "an agency cannot change its initial interpretation of a regulation by issuing a later interpretation without going through notice and comment unless an exception applies, *but an exception always applies*." Br. of Federal Appellees at 42, *Mortgage Bankers Ass'n* v. *Solis*, No. 12-5246 (D.C. Cir. 2013) (emphasis added). Given that representation, petitioners' late-breaking concerns that *Paralyzed Veterans* improperly interferes with agency decisionmaking are less than credible.

To the extent *Paralyzed Veterans* provides an incentive to agencies to engage in notice and comment before issuing interpretations that contradict prior definitive interpretations, that should hardly be a concern. Good government is predicated upon just such checks, and the only procedure required is that already approved by Congress in the APA.

This is why the intervenors' parade of horribles (at 50) implicates no legitimate concerns. First,

where an agency realizes an error in interpretation a month after an initial interpretive rule, it is difficult to see how the initial interpretation could have been sufficiently definitive to trigger the doctrine in the first instance (and might be a candidate for the "good cause" exemption in all events). Second, if an agency wishes to change substantive positions on an issue, it is free to do so—it simply needs to go through notice-and-comment procedures. Third, *Paralyzed Veterans* does not prevent an agency from revising lower-level opinions, as they would obviously not be definitive.

More than anything, the intervenors' parade of horribles—like petitioners' overbroad questions presented—reveals a fundamental lack of understanding about what the *Paralyzed Veterans* doctrine actually entails. See Intervenors' Pet. at i ("Whether agencies subject to the Administrative Procedure Act are *categorically prohibited from revising their interpretive rules* unless such revisions are made through notice-and-comment rulemaking." (emphasis added) (omitting requirements that prior interpretation be definitive and then subsequent revision be substantial)); Government Pet. at i ("Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation." (omitting requirement that the prior rule must be "authoritative" or "definitive")).

What is more, discarding *Paralyzed Veterans* would silence voices from participating in the "interpretive dialogue" that petitioners aim to foster,

Intervenors' Br. at 49—with no corresponding gain in government transparency or accountability. Without the procedural check of *Paralyzed Veterans*, an agency could promulgate a vague rule through notice and comment and then come back to "interpret" that rule with the precision desired in the first instance. The intervenors get this point exactly backwards (at 52) because they fail to acknowledge the deference afforded to agency interpretations. See *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."). And there would be no offsetting gain in the clarity of regulations, as petitioners speculate, because there would be little, if any, incentive to draft clear regulations in the first place.

Even more unpersuasive is the claim that *Paralyzed Veterans* somehow chills agencies from providing helpful guidance. See, e.g., Government Br. at 25-26. Setting aside that those fears have failed to materialize over the nearly 20 years since *Paralyzed Veterans* has been the law of the D.C. Circuit, the claim vastly overstates the breadth of the *Paralyzed Veterans* doctrine, which is not triggered by garden-variety interpretive rules that are neither definitive nor substantial modifications.

Contrary to petitioners' apparent view, notice-and-comment procedures exist primarily to protect the regulated, not to hinder the regulators. In this case, the Department cited no change in the statute or the regulations. Nor did it cite any change in the industry—or in the typical job duties at issue. Instead, the Department (under a new administration)—without any warning—*sua sponte* reconsidered the same question and reached a completely different outcome. Thankfully, such extreme agency flip-flopping is rare. But the importance of *Paralyzed Veterans* in ensuring that it remains so cannot be overstated. *N.C. Growers' Ass'n*, 702 F.3d at 772 (Wilkinson, J., concurring).

D. *Paralyzed Veterans* Respects The Separation Of Powers

Once government is enabled to control the governed, the second great difficulty lies in obliging it to control itself. THE FEDERALIST No. 51, at 347-53 (James Madison) (Clinton Rossiter ed., 1961). The greatest structural device for accomplishing this task is the separation of powers instituted by the Framers. And so, important as they are, the salutary effects of *Paralyzed Veterans* are not limited to promoting government accountability and protecting reliance interests. The doctrine also maintains separation of powers.

Administrative agencies, though situated in the Executive Branch, possess a great deal of legislative

power delegated from Congress. Filling the gaps left in statutes for the exercise of agency expertise and then enforcement of the resulting rules is the primary job of an agency. Congress has also granted agencies limited jurisdiction to adjudicate claims related to their spheres of influence. This has been held not to violate separation of powers. See, e.g., *CFTC* v. *Schor*, 478 U.S. 833, 851-52 (1986). It is imperative, however, that each of these roles be kept distinct to avoid offending the separation of powers principle:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151-152 (O. Piest ed., T. Nugent transl. 1949).

Talk Am., Inc., 131 S. Ct. at 2266 (Scalia, J., concurring). *Paralyzed Veterans* keeps administrative authority within proper bounds by refusing to allow agencies to take a short cut around the APA cornerstone of notice and comment and exceed the limits Congress set on agencies' ability to act unilaterally.

As Justice Scalia has noted, the ability of an agency to both make and interpret law runs the risk

of violating separation of powers. *Ibid.* While there must be some interpretation inherent in adjudications made by an agency, that is a fundamentally different enterprise from allowing agencies blanket authority to effectively rewrite their own regulations from time to time under the guise of "interpreting" those regulations—particularly given the deference accorded by courts to agency interpretations. And the notice component, which has long been a fixture of societies governed by the rule of law, serves as a buffer for regulated entities against political overreach disguised as interpretation. See Posner, *The Rise and Fall of Administrative Law*, 72 Chi.-Kent L. Rev. 953, 954 (1997) (noting that the APA was passed as a "reaction to the politicization of some agencies"). *Paralyzed Veterans* ensures that agency power, though possessing attributes of each branch of government, is appropriately cabined.

II. *PARALYZED VETERANS* PROPERLY CONSTRUES THE APA'S EXEMPTION FOR "INTERPRETIVE RULES"

Despite the strong evidence that the APA requires notice and comment where a substantial change is made to a definitive agency interpretation, petitioners argue that this Court should jettison *Paralyzed Veterans* because the doctrine cannot be reconciled with the APA's text—specifically, with the APA's exception to notice and comment for "interpretive rules." That argument is wrong, however, for at least two reasons.

First, as demonstrated above, where an agency substantially revises a prior, authoritative interpretation of its regulation, the agency has effectively amended its regulation—something it cannot do without notice and comment.[7]

Second, as demonstrated below, not all agency interpretations are "interpretive rules" exempt from notice and comment. See, e.g., 5 U.S.C. § 551(4) (defining "rule" as "an agency statement of general applicability and future effect designed to implement, *interpret*, or prescribe law or policy * * * *" (emphasis added)). Where an agency holds out its interpretation as "controlling" and "substantive"—and third parties can seek to impose liability on the basis of that interpretation—it is a legislative rule in interpretive clothing, and requires notice and comment for that reason, too.

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[7] The government has previously argued against *Paralyzed Veterans* by noting that a literary critic's new interpretation of *Hamlet* does not create a new play—and by analogy, a new interpretation of a rule does not create a new regulation. Br. of Federal Appellees, *Mortgage Bankers Ass'n* v. *Harris* at 30. That analogy is flawed, however, because, unlike in the government's analogy, an agency is *both* critic and playwright. Viewed in that light, a new interpretation of Hamlet by Shakespeare himself in which Hamlet and Ophelia lived happily ever after would surely be more than just a new interpretation.

A. As Originally Understood, The APA's Exemption For "Interpretive Rules" Does Not Apply To The Agency Action Here

As discussed above, the APA makes notice and comment the default rule for agency action, but then provides:

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to *interpretative rules*, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b) (emphasis added). The APA does not define the term "interpretative" (or interpretive) rule. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term [in question] *at the time Congress enacted the statute* * * * *" *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (emphasis added) (citing *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975)). That analysis supports the view that the APA's exemption for "interpretive rules" did not excuse the

Department from engaging in notice and comment before adopting AI 2010-1—particularly given that the exemption should be narrowly construed in view of the important purposes served by the APA's procedural requirements. See, e.g., *Caraballo* v. *Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993); see also 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47:11 (7th ed.) (discussing general canon of construction that exceptions to statutes should be construed narrowly).

Most fundamentally, when Congress enacted the APA, "interpretive rules" were prospective interpretations of (primarily) statutes that would be accorded little, if any, weight by courts. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138 (1944) ("[Interpretive rules] provide a practical guide * * * as to how [the agency] will seek to apply [the statute]."); Comm. on Admin. Proc., U.S. Att'y Gen., *Administrative Procedure in Government Agencies*, Final Report, S. Doc. No. 77-8, at 27 (1st Sess. 1941) [Final Report] ("Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected * * * *"); *Administrative Procedure Act—Legislative History 1944-46*, S. Doc. No. 248, 79th Cong., 2nd Sess. (1946), at 18 (arguing for exclusion of interpretive rules from notice and comment because "interpretive rules—as merely interpretations of statutory provisions—are subject to plenary judicial review"). Yet from the beginning, it was understood that not all

agency interpretations would be "interpretive rules" exempt from notice and comment. Final Report 27 ("An agency's interpretations *may* take the form of 'interpretive rules.'") (emphasis added).

Specifically, interpretive rules were juxtaposed with "legislative" or substantive rules that filled in gaps left by Congress for agencies to bring to bear their subject-matter expertise and to which courts were therefore expected to defer. *Ibid.* ("Many statutes contain provisions which become fully operative only after exercise of an agency's rule-making function. * * * Thus these *substantive* regulations have many of the attributes of statutes themselves and are well described as subordinate legislation.") (emphasis added).

As the government points out, the Chair of the ABA's Committee on Administrative Procedure, Mr. McFarland, testified to the House of Representatives that he thought interpretive regulations should be exempt from notice-and-comment rulemaking. *Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm.*, 79th Cong., 1st Sess. 30, at 76 (1945). In the same conversation, however, the Chair of the Judiciary Committee interrupted Mr. McFarland to make clear that "[t]he interpretive regulations of substantive regulations become very definitely *substantive*." *Ibid.* (emphasis added).

The year after Congress passed the APA, the Attorney General issued a Manual on the statute that has become instructive—if not authoritative—in

construing it. In explaining that agencies might offer "interpretive rules" for both statutes and regulations, the manual provided examples of both substantive (or "legislative") and interpretive rules. *Attorney General's Manual* 30 n.3. The example provided of substantive rules was the proxy rules promulgated by the SEC pursuant to the Securities Exchange Act of 1934. *Ibid.* Those rules are what one would expect from rules designed to have the force and effect of law. Specifically, they list five types of individuals or institutions that would be exempt from the proxy rules. 1935 SEC LEXIS 378, Rule LA2.

In contrast, when explaining "interpretive rules," the Attorney General's Manual cites the 1941 Final Report, the 1945 Senate Comparative Print, and earlier Senate Judiciary Committee Hearings on the APA. *Attorney General's Manual* 30 n.3. The view expressed in each of those sources is that interpretive rules do not have the force of law and are not entitled to judicial deference.

That original understanding of interpretive rules is confirmed by this Court's decision in *Bowles* v. *Seminole Rock*, 325 U.S. 410 (1945)—issued the year before the APA was enacted. *Seminole Rock* generally serves as the basis for judicial deference to agency interpretations of their own regulations. The Court held there that an agency's interpretation in a manual should be given considerable weight in determining the meaning of the regulation for which it provided interpretive guidance. *Id.* at 414. The Court did not

address whether the interpretation at issue was an "interpretive rule" within the meaning of § 553(b)(A).

The agency interpretation in *Seminole Rock* was not just consistent with the regulation itself and the agency's previous positions, though. It was also "issued by the Administrator *concurrently* with the [regulation]." *Id.* at 414-17 (emphasis added). In that respect, the manual was much like the Preamble to the 2004 regulations here—a logically suitable place for a genuinely interpretive guideline.

Taken together, the source materials concerning what Congress thought it was exempting from notice and comment as "interpretive rules" are best read as encompassing (i) non-authoritative interpretations of statutes, or (ii) interpretations of regulations issued at the same time as the regulations themselves (much like preambles to rules today). It makes sense, then, why agencies would not be required to engage in notice and comment to promulgate "interpretive rules," properly understood. Such rules would lack the force of law, receive little if any judicial deference, and present no issue of agency flip-flopping (because, to the extent they would even involve an agency's interpretation of its own regulation, they would be issued concurrently with that regulation, as in *Seminole Rock*, and thus virtually part of the regulation itself).

The AI 2010-1, of course, is none of those things. It is neither an interpretation of a statute, nor a contemporaneous explanation of a new regulation.

Petitioners themselves have held out AI 2010-1 as (1) "controlling"—having the force and effect of law, DOL *Amicus* Brief at 14; (2) "substantive," *id.* at 27-28; and (3) "definitive," Putative Intervenors' Motion to Intervene at 25. Having done so, the Department should hardly be surprised to find itself required to engage in notice and comment to adopt a rule that, in the Department's own words, is practically indistinguishable from a legislative rule. See, e.g., *Chief Probation Officers*, 118 F.3d at 1333 n.6 ("Regulations, for example, often spell out what a statute requires. If these rules are held out as having the force of law, they are not immune from the notice and comment procedure.").

Indeed, AI 2010-1 is much more akin to the SEC proxy rules presented as the quintessential example of a legislative rule. *Attorney General's Manual* 30 n.3. Like the proxy rules, AI 2010-1 singles out a group not covered by the regulation and thereby alters substantive rights. It aligns with what a member of the Securities & Exchange Commission told Congress (when the APA was being debated) about the difference between interpretive rules and legislative rules:

> As I see an interpretive rule, it is a rule in which the Commission, in formal fashion, states its opinion as to what the statute means. That expression, of course, is not binding on the courts, because the last word as to the meaning of words in a statute rests with the court * * * * We have exemption rules letting companies out of these statutes

> or certain sections of them where it is perfectly plain they do not fall within the intention of the statute. Those exemption rules, I would say, are fair examples of legislative rules * * * *

Senate Hearings on the Administrative Procedure Act Before the Judiciary Comm. at 330-31 (1941). It would have been unthinkable to the drafters of the APA that an interpretation held out by the agency itself as "controlling" and "substantive" (and by its defenders as "definitive") concerning who does and does not qualify for the administrative exemption—and subjecting employers to liability to third parties for conduct the agency previously declared perfectly lawful—would be deemed an "interpretive rule" exempt from notice and comment. Such a rule may be an interpretation—but it has a legislative effect that removes it from the category of "interpretive rules" within the meaning of the APA.

This also aligns with the Executive Order that currently defines agency regulations. 58 Fed. Reg. 190 (1993) (defining a "[r]egulation" or "rule" that requires notice-and-comment procedures as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy"). If an agency intends an interpretation to have the force of law—whether by an agency enforcement action or by a private civil action—it makes no difference that the action is "interpreting" the law or that the agency labels it an

"interpretive rule." Here, where the Department offered a (1) definitive interpretation, (2) which it announced publicly, (3) on which reliance was intended, and argued that it was (4) controlling and (5) entitled to deference so that it would (6) have the force of law, notice and comment was required.

B. When An Agency Holds Out Its Own Rule As "Substantive" And "Controlling," Requiring Notice And Comment Does No Violence To The APA

To recap, where, as here, an agency issues a rule significantly revising the agency's own prior, authoritative interpretation of a regulation, the prior interpretation essentially "finishes the job" of creating the regulation itself—and the later-in-time interpretation is therefore functionally an amendment to the regulation and is properly subject to notice and comment. *Alaska Hunters*, 177 F.3d at 1034.

Additionally, where, as here, an agency holds out an interpretation as controlling, definitive, and substantive—as the Department has done with AI 2010-1—that interpretation has a legislative effect that takes it out of the ambit of the APA's exemption from notice and comment for "interpretive rules." See, e.g., *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements * * * by labeling a major substantive legal addition to a rule a mere interpretation.").

As detailed above, both conclusions find strong support in the original understanding of the differences between legislative and interpretive rules and both comport with the text, structure, history, and purpose of the APA.[8]

That functional approach aligns with—indeed, is virtually compelled by—the reality of a world in which courts generally afford agency interpretations of their own regulations *Auer* deference. And a functional view of what is truly an "interpretive rule" is even more important where, as here, an agency relies on private parties to spearhead enforcement of that regulation. That is precisely why the intervenors in this case have relied so heavily on *Auer*'s holding that agency interpretations of their

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[8] Contrary to the government's contentions (at 6-7), the Association did not "acknowledge" that AI 2010-1 "was an interpretative rule." The Association did acknowledge that it was an "interpretation" but noted that the label was insignificant given that, under *Paralyzed Veterans*, the name attached to agency action is not dispositive. See MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17). And given the government's concessions that both prongs of the *Paralyzed Veterans* test are satisfied in this case, the distinction was irrelevant in the D.C. Circuit, where the only issue was whether reliance is a standalone element of the doctrine. Most important, the Association has always maintained that without notice and comment, AI 2010-1 is invalid—and thus the Association had no need under the binding authority of *Paralyzed Veterans* to invoke the vexing interpretive/legislative dichotomy.

own regulations are entitled to deference. See, e.g., Putative Intervenors' Motion to Intervene at 17.[9]

Perhaps more important, the Department has explicitly sought controlling deference for the AI 2010-1 while appearing as *amicus* in litigation to assist private parties seeking to impose liability on employers. See generally DOL *Amicus* Brief. *Auer* deference thus results in a rule with the force and effect of law—and confirms that the rule here is not an "interpretive rule" for APA purposes. So long as *Auer* holds sway, a functional approach to the APA's exemptions is not just acceptable—it is a necessity. An agency should not be able to escape notice and comment on the front end by labelling a rule "interpretive" and then seek *Auer* deference on the back end by claiming that the rule is "controlling." As one commentator has put it, "[t]he administrative agency should be put to the election whether to obtain legislative effect by providing for notice and comment or to forego this effect and adopt the rule without notice and comment." Kevin W. Saunders, *Interpretive Rules With Legislative Effect: An Analysis And A Proposal For Public Participation*, 1986 DUKE L. J. 346, 382.

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[9] The private party intervenors—but not the government—now attempt to retreat from that position by arguing (at 42-43) that courts will not defer to agency interpretations that are inconsistent. That argument ignores the Department's own litigation position that AI 2010-1 is entitled to controlling deference. See generally DOL *Amicus* Brief.

All of this confirms that *Paralyzed Veterans* is entirely consistent with the APA in both letter and spirit. A critical reason why the APA exempted interpretive rules from notice and comment in the first place is because such rules were not entitled to judicial deference. *Christensen*, 529 U.S. at 589 (Scalia, J., concurring in part and concurring in the judgment) (explaining that the lack of deference "accounts for that provision of the 1946 Administrative Procedure Act which exempted 'interpretive rules' (since they would not be authoritative) from the notice-and-comment requirements applicable to rulemaking, see 5 U.S.C. § 553(b)(A)." (citation omitted)).

Paralyzed Veterans faithfully enforces the APA's exemption of "interpretive rules" by properly refusing to apply that exemption to rules that, whatever their label, are functionally legislative rules—either because they effectively amend an agency regulation, or because they have legislative effect (i.e., they have the force of law and substantively alter legal rights and obligations). Either way, only those agency rules that are truly "interpretive" as that term was originally understood—i.e., lacking the force and effect of law—should be exempt from notice and comment (abiding by the text of the APA), and that analysis must take into account how the rule in question actually functions (adhering to the spirit of the APA).

Moreover, whatever the strength and rationale of *Paralyzed Veterans* in other contexts, there is an additional reason that notice-and-comment rulemaking was required here. Section 13 of the FLSA delegates

to the Department the authority to "define" and "delimit" rules according to the rulemaking process. 29 U.S.C. § 213. Thus, when it acts pursuant to Section 13, as it did in this case, the Department is exercising substantive rulemaking power delegated to it by Congress. Like the SEC with the proxy rules considered quintessentially legislative when Congress enacted the APA, the Department exercised its § 213 substantive rulemaking power to mark the boundaries for inclusion or exclusion of individuals with respect to the FLSA's white-collar exemptions. Whether AI 2010-1 is deemed the functional equivalent of an amendment to the 2004 regulations, or an interpretation with legislative effect, it does not fit within the APA's exemption for interpretive rules.

Regarding AI 2010-1, the Department described its later-in-time interpretation as "controlling" and "substantive." And it cleared the way for private parties to impose liability on employers for conduct that was previously authorized by the Department itself. Nothing in the APA requires, much less supports, overturning the D.C. Circuit's judgment that while the Department is free to issue such a rule, it must first go through notice and comment.[10]

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[10] The D.C. Circuit is hardly an outlier in that regard. In *SBC Inc.* v. *FCC*, 414 F.3d 486, 498 (3d Cir. 2005), the Third Circuit held, consistent with *Paralyzed Veterans*, that "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment

(Continued on following page)

As Professor John Manning has explained, "[t]he central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice and comment procedures, or a proper interpretive rule or general statement of policy exempt from such procedures?" John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917 (2004). *Paralyzed Veterans* can thus be understood as a sorting mechanism that, when certain prerequisites are satisfied, simplifies the notoriously difficult inquiry into when agency action is an "interpretive rule" exempt from notice and comment and when it is a legislative rule that is invalid without it. See *id.* at 893 ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'"); *Nat'l Min. Ass'n* v. *McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014)

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requirements of the APA." The Fifth Circuit has agreed that "the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well-established regulatory interpretation," *Shell Offshore*, 238 F.3d at 629, and the Sixth Circuit had noted that notice and comment will "often be required" "once an agency gives a regulation an interpretation." *Dismas Charities, Inc.* v. *U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005). And in *Erringer* v. *Thompson*, 371 F.3d 625, 632 (9th Cir. 2004), the Ninth Circuit stated approvingly that "[a]ny rule that effectively amends a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking." The only Circuit to explicitly disagree with *Paralyzed Veterans* is the Seventh, and it did so in dicta. *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536 (7th Cir. 2012) (Castillo, D.J., sitting by designation).

(Kavanaugh, J.) ("[W]e need to know how to classify an agency action as a legislative rule, interpretive rule, or general statement of policy That inquiry turns out to be quite difficult and confused."). Jettisoning *Paralyzed Veterans* would only add to the confusion by needlessly eliminating a helpful analytical tool for classifying agency action and enforcing the APA's mandate for fair, uniform agency procedures.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY BRIEF

Nos. 13-1041 and 13-1052

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

JEROME NICKOLS, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

A. An interpretive rule does not "effectively amend" the legislative regulation that it interprets 3
B. The *Paralyzed Veterans* doctrine is not supported by respondent's judicial-deference arguments 7
C. The *Paralyzed Veterans* doctrine is inconsistent with this Court's teachings 18
D. Respondent's attempted reformulation of the term "interpretive rule" does not justify the *Paralyzed Veterans* doctrine 20
E. Respondent's policy contentions lack merit 22
Conclusion 25

TABLE OF AUTHORITIES

Cases:

American Mining Cong. v. *Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993) 10
American Postal Workers Union v. *USPS*, 707 F.2d 548 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984) 17
Auer v. *Robbins*, 519 U. S. 452 (1997) 3
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 3, 13, 15
Chase Bank USA, N.A. v. *McCoy*, 131 S. Ct. 871 (2011) 6
Chief Prob. Officers v. *Shalala*, 118 F.3d 1327 (9th Cir. 1997) 17
Christensen v. *Harris Cnty.*, 529 U.S. 576 (2000) 19, 20
Christopher v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) 15
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 12, 17
Decker v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) 14

Cases—Continued: Page

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 4, 16
Granite Rock Co. v. *International Bhd. of Teamsters*, 561 U.S. 287 (2010) 8
Kennedy v. *Plan Adm'r*, 555 U.S. 285 (2009) 15
Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 15
Metropolitan Sch. Dist. v. *Davila*, 969 F.2d 485, 494 (7th Cir. 1992), cert. denied, 507 U.S. 949 (1993) 17
National Family Planning & Reprod. Health Ass'n v. *Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) 5
Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998) 2, 10, 11
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 1, 6, 7, 12, 21
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 13
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 13, 14, 15
Transportation Workers Union v. *TSA*, 492 F.3d 471 (D.C. Cir. 2007) 11
United States v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) 5
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 2, 18, 19, 24

Statutes, regulation and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 551(4) 21
5 U.S.C. 551(5) 2, 4
5 U.S.C. 553 18

Statutes, regulations and rule—Continued: Page

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5 U.S.C. 553(b)(A) 2, 4, 9
5 U.S.C. 553(c) 12
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 13, 16, 24
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*:
29 U.S.C. 259(a) 16, 25
29 U.S.C. 259(b)(1) 25
Exec. Order No. 12,866, 3 C.F.R. 641 (1993 comp.), reprinted as amended at 5 U.S.C. 601 note 22
Sup. Ct. R. 15.2 8

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S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 24

In the Supreme Court of the United States

No. 13-1041

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

No. 13-1052

JEROME NICKOLS, ET AL., PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

This case concerns whether a federal agency must use notice-and-comment-rulemaking procedures to correct or significantly revise an interpretive rule that construes a legislative regulation. Unlike legislative rules, interpretive rules "do not have the force and effect of law"; they "advise the public of the agency's construction of the statutes and rules" that do. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (*Guernsey*) (citation omitted). The Administrative Procedure Act (APA) expressly and categorically

exempts the "formulat[ion]," "amend[ment]," and "repeal[]" of interpretive rules from the Act's notice-and-comment rulemaking procedures. 5 U.S.C. 551(5), 553(b)(A); see Gov't Br. 15-17.

The doctrine developed by the D.C. Circuit in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (1997), cert. denied, 523 U.S. 1003 (1998), nevertheless requires an agency to use notice-and-comment rulemaking to issue an interpretive rule that significantly amends or repeals an earlier interpretive rule. Gov't Br. 13-14. As explained in our opening brief, that doctrine is inconsistent with the APA's text (*id.* at 15-17); this Court's precedents (*id.* at 17-20); and Congress's intent to encourage, not obstruct, public access to agency interpretations (*id.* at 20-26). The *Paralyzed Veterans* doctrine also runs afoul of this Court's repeated admonition to follow the "very basic tenet of administrative law" that agencies should be left free to fashion their own procedures and that reviewing courts "stray beyond the judicial province" when they impose rulemaking procedures exceeding the APA's "statutory *minima*," even if the courts conclude that the additional procedures "are 'best' or most likely to further * * * [the] public good." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544-545, 548-549 (1978). See Gov't Br. 27-29.

Respondent attempts to side-step those basic points by asserting (Br. 14, 20-21, 37, 45) two justifications for the *Paralyzed Veterans* doctrine. First, respondent contends (Br. 20) that an agency's second interpretive rule "effectively amend[s]" not only the agency's earlier interpretive rule that it supplants, but also the underlying legislative regulation being interpreted. And because an amendment of a legislative

regulation requires notice-and-comment rulemaking, respondent reasons, so too does the revised interpretive rule. Second, respondent invokes the long-established doctrine of judicial deference to an agency's interpretation of its own legislative regulations—as reflected in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and the more recent decision on which respondent relies, *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Respondent contends (Br. 21, 37, 47) that a definitive agency interpretation of a legislative rule is itself "a legislative rule in interpretive clothing" having "the force of law," because granting "*Auer* deference [to an agency's interpretive rule] * * * results in a rule with the force and effect of law." This result, in respondent's view, requires notice-and-comment rulemaking.

Those contentions are without merit. So too are respondent's attempt (Br. 23-28) to distinguish this Court's precedents, its assertion (Br. 38-45) regarding Congress's "original understanding" of the APA exemption for interpretive rules, and its reliance (Br. 28-34) on policy arguments.

A. An Interpretive Rule Does Not "Effectively Amend" The Legislative Regulation That It Interprets

Respondent first contends (Br. 20) that the *Paralyzed Veterans* doctrine "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself." That is so, respondent insists (Br. 23), because the agency has said that the regulation now means something different than what the agency said it meant before. Respondent's brief, however, fails to articulate cogent *reasons* why those bare assertions are correct. And

they are not. An agency interpretation of regulatory text does not amend—effectively or otherwise—the legislative regulation being interpreted.

1. Respondent concedes (Br. 21-22) that when an agency first formulates an interpretive rule, it is "permitted to interpret an ambiguous regulatory provision," and that its "initial interpretation" will "fall within the [APA's] exception to notice and comment in [5 U.S.C.] 553(b)(A)." But the Act's notice-and-comment "rule making" exception makes clear that the agency's subsequent amendment or repeal of that same rule can be accomplished in the same manner.

Congress expressly exempted all "interpretative rules" from the notice-and-comment requirements for "rule making," 5 U.S.C. 553(b) and (b)(A), and defined "rule making" to mean the agency process for "formulating, amending, or repealing" a rule. 5 U.S.C. 551(5). Thus, as our opening brief explains (at 16-17, 30-31), if the agency can "formulate" an interpretive rule without notice and comment because the rule falls within the APA's "rule making" exception, the agency can later "amend" or "repeal" that same interpretive rule without notice and comment because the relevant exception extends to any "rule making" concerning that rule, not merely its initial "formulation." In fact, the APA more generally "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Respondent has offered no response to that straightforward textual analysis.

2. Respondent seeks to avoid the conclusion the APA's text compels by asserting (Br. 21) that once the agency issues an interpretive rule, the agency's "de-

finitive interpretation becomes part of the [legislative] regulation itself" and that, as a result, "the regulation is no longer ambiguous." Again, respondent offers no support for its assertion.

When an agency issues an interpretive rule construing a legislative regulation, the legislative regulation is itself unchanged—just as a statute remains unchanged when the agency charged with administering the statute issues a rule interpreting it. The agency's statement of its own understanding of a legislative regulation in an interpretive rule does not alter the regulation's text or any other aspect of the regulation. Respondent's one citation for its amendment-by-agency-interpretation theory states that *"[i]f the courts accept* the agency's interpretation, it becomes a part of the statutory law." Br. 21-22 (quoting *National Family Planning & Reprod. Health Ass'n* v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992)) (emphasis added). But that passage shows that an agency's interpretation does not effectively amend the underlying regulation. Indeed, *National Family Planning* emphasized that this Court had previously interpreted the regulation at issue and explained that "the *Supreme Court's* accepted interpretation of the clear meaning of the underlying regulation" cannot later be altered by an agency without amending the terms of the regulation itself. 979 F.3d at 234, 240 (emphasis added). Cf. *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) (explaining that once this Court "has already interpreted [a] statute," "there is no longer any different construction * * * available for adoption by the agency").

Doctrines governing judicial deference to agency interpretations likewise offer respondent no support.

If respondent were correct that an agency's interpretive rule effectively amends the legislative regulation it construes, litigants and the courts would never have to discuss the substantive validity of the agency's interpretation, because they would take as a given that the agency's interpretation had already "amended" the regulation and thus *ipso facto* properly reflects the true meaning of the regulation's text. But that is not how judicial review works. When the meaning of a legislative regulation is relevant to a claim in litigation, the court, applying principles of deference, may decide to follow the agency's interpretation of the regulation. But if it does, it is the *court* (not the agency) that ultimately has determined the regulation's meaning in the case. And like an interpretive rule, such a judicial interpretation construes—not amends—the regulation in question.

3. Respondent suggests (Br. 22) that dictum in *Guernsey* supports the proposition that when an agency attempts to revise its interpretation of a legislative regulation, "it is impermissibly seeking to adopt a new position wholly inconsistent with the regulation." But as our opening brief explains (at 32-34), *Guernsey* simply recognized that an interpretive rule (Section 233 of Medicare's Provider Reimbursement Manual (PRM)) cannot adopt a "position inconsistent with any of the [agency's] existing [legislative] regulations," 514 U.S. at 100, because such an interpretation would be *substantively* invalid. Cf. *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 882 (2011) (agency's interpretation of regulation is "inconsistent with the regulation" when it conflicts with the regulation's unambiguous text) (citation omitted). In other words, if an agency desires to adopt a position precluded by the

text of its own legislative regulation, it must amend that regulation through notice-and-comment rulemaking.

The court of appeals in *Guernsey* had identified what it believed was such a conflict between the agency's legislative regulations—which the court of appeals read as requiring the agency to follow Generally Accepted Accounting Principles (GAAP)—and an agency interpretive rule that "departed from GAAP." 514 U.S. at 91. That court thus concluded that the interpretive rule was invalid and would require a "substantive change in the regulations" through notice-and-comment rulemaking. *Ibid.* Once this Court concluded that the legislative regulations did not require the use of GAAP, *id.* at 92-95, it rejected the court of appeals' view that following the agency's interpretive rule would impermissibly effect "a substantive change in the regulations," *id.* at 100 (citation omitted). Thus, respondent is incorrect in contending (Br. 24) that *Guernsey* supports its view that notice-and-comment rulemaking was needed to issue the 2010 Administrator's Interpretation (AI) in this case because that interpretation "effect[ed] substantive changes" to the agency's earlier *interpretation* of its regulations. *Guernsey* did not involve a changed agency interpretation of regulations; it merely recognized that an agency interpretation of legislative regulations cannot contradict the regulations themselves. Gov't Br. 32-34.

B. The *Paralyzed Veterans* Doctrine Is Not Supported By Respondent's Judicial-Deference Arguments

Respondent's alternative defense of the D.C. Circuit's *Paralyzed Veterans* doctrine fares no better. In respondent's view (Br. 21, 37, 47), a definitive agency

interpretation of a legislative regulation is itself "a legislative rule in interpretive clothing" having "the force of law," because granting "*Auer* deference [to an agency's interpretive rule] * * * results in a rule with the force and effect of law." Respondent has forfeited that basis for challenging the 2010 AI, and that basis in any event lacks merit. It is also inconsistent with the doctrine that respondent purports to defend. The *Paralyzed Veterans* doctrine applies only to a changed agency interpretation. Yet the logic of respondent's deference arguments would apply equally to an agency's initial interpretive rule, which respondent *concedes* does not require notice-and-comment rulemaking.

1. As explained in our certiorari petition, respondent acknowledged in district court that the government was "correct" that the Department of Labor's (Department's) 2010 AI is an interpretive rule, but argued that, under *Paralyzed Veterans*, an "interpretive rule" can be subject to notice-and-comment-rulemaking requirements. 13-1041 Pet. 6; accord Gov't Br. 6-7. Respondent now denies (Br. 46 n.8) that it acknowledged below that the 2010 AI is an "interpretive rule," asserting instead that it merely conceded that the AI was an "interpretation." But because respondent's brief in opposition failed to dispute this point, respondent has waived it in this Court. See *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 306 & n.14 (2010) (discussing Sup. Ct. R. 15.2).

In any event, respondent did forfeit the point below. Respondent maintained in district court that the government was "correct" that the 2010 AI was an interpretive rule, but it asserted that that conclusion

was "of no moment" because, "'[e]ven if [a] pronouncement can be considered an *interpretative rule*, it still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans*." Dist. Ct. Doc. 17, at 7 n.10 (emphasis added; citation omitted; brackets in original). Given that respondent was responding directly to the government's contention that "[t]here is no dispute between the parties that the 2010 AI is an interpretive rule" and that 5 U.S.C. 553(b)(A) "expressly exempts interpretive rules from [the APA's notice-and-comment-rulemaking] requirements," Dist. Ct. Doc. 15, at 14 & n.8, respondent's position can only reasonably be understood as conceding that the 2010 AI is an "interpretive rule." The district court thus recognized that the parties' dispute turned on whether notice-and-comment rulemaking was required to issue that "interpretive rule," and the court "conduct[ed] its analysis from that perspective." 13-1041 Pet. App. 31a n.7. Indeed, this case has always been litigated on that understanding, which is why the Question Presented on which the Court granted certiorari is "[w]hether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an *interpretive rule* that articulates an interpretation of an agency regulation." 13-1041 Pet. I (emphasis added).

2. Respondent's concession reflects the underlying premise of the *Paralyzed Veterans* doctrine: That a rule's status as an "interpretive rule" does not exempt it from notice-and-comment rulemaking (despite the APA's express exception for such rules) if it significantly alters the agency's prior interpretation of a legislative regulation.

Indeed, *Paralyzed Veterans* itself recognized the difference between (1) the argument that an "interpretive rule" significantly altering a prior agency interpretation of a regulation must be issued using notice-and-comment rulemaking, and (2) the distinct argument that the agency's revised interpretation is itself a "substantive" (*i.e.*, legislative) rule that must be promulgated using notice-and-comment rulemaking. The *Paralyzed Veterans* court first articulated the doctrine at issue here, concluding that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." 117 F.3d at 586. The court found that principle inapplicable in the case before it, however, because it "conclude[d]" that the relevant agency "never authoritatively adopted a position contrary to its [current] interpretation." *Id.* at 587. The court then *separately* examined "whether the interpretation is itself a 'substantive rule' having the force of law" and made clear that that distinct issue was an "independent * * * reason" for requiring notice-and-comment rulemaking. *Ibid.* Because that second inquiry required "draw[ing] a line between substantive and interpretative rules," the D.C. Circuit repeatedly cited *American Mining Congress* v. *Mine Safety & Health Administration*, 995 F.2d 1106, 1108-1110 (D.C. Cir. 1993)—its leading decision on the APA's distinction between legislative and interpretive rules—in the course of concluding that the rule at issue was an interpretive rule. *Paralyzed Veterans*, 117 F.3d at 587-588.

Since *Paralyzed Veterans*, the D.C. Circuit has continued to distinguish between those distinct legal

arguments. See, *e.g.*, *Transportation Workers Union* v. *TSA*, 492 F.3d 471, 475 (2007) (explaining that an argument under "[the *Paralyzed Veterans*] line of cases holding that an agency cannot significantly change its position * * * , even between two interpretive rules, without prior notice and comment" is distinct from the argument that the interpretation at issue is not an "'interpretive rule'" at all but rather "a 'legislative rule' or 'substantive rule,' which would require notice and comment"). Accordingly, the D.C. Circuit has repeatedly framed its *Paralyzed Veterans* doctrine as requiring notice-and-comment rulemaking for "interpretive rules," Gov't Br. 13-14 (citing and quoting cases), and, to our knowledge, has never stated that its doctrine rests on the view that a challenged agency interpretation of a legislative regulation is actually a "legislative rule." Respondent thus is incorrect in asserting (Br. 46 n.8) that the legislative/interpretive distinction "was irrelevant" below because *Paralyzed Veterans* was "binding authority." The distinction would have been relevant because it would have been a separate basis for arguing that notice-and-comment rulemaking was required, yet respondent forfeited that argument by failing to raise it below.

3. The D.C. Circuit has never adopted respondent's deference-based justification for the *Paralyzed Veterans* doctrine, and with good reason: The justification is incorrect and inconsistent with the doctrine itself.

a. Legislative rules must be issued using notice-and-comment rulemaking, 5 U.S.C. 553(b) and (c). If properly promulgated, they "have the 'force and effect of law.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295,

302-303 (1979). Interpretive rules, by contrast, "do not require notice and comment" and "do not have the force and effect of law." *Guernsey*, 514 U.S. at 99. Respondent nevertheless argues (Br. 21, 37, 47) that a "definitive [agency] interpretation[] take[s] on the force of law" and thus constitutes a "legislative rule in interpretive clothing" because "*Auer* deference * * * results in a rule with the force and effect of law." Respondent thus apparently argues that an agency's *new* interpretation that significantly revises an earlier agency interpretation of a regulation has the "force of law" (by virtue of *Seminole Rock/Auer* deference) and for that reason qualifies as a legislative rule for which notice-and-comment rulemaking is required. That contention fundamentally misconceives the role of deference principles in judicial adjudication.

The *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), which was influential in the legislative evolution of the APA, explained that courts conducting "judicial review" will "speak the final word on interpretation" of a statute, but that they need not "substitute their own interpretations for those of the administrative agencies" because judicial review can be appropriately "limited to the inquiry whether the administrative construction is a permissible one." *Id.* at 78. The report explained that a reviewing "court may accept [the construction] of the administrative body" if the "statute is reasonably susceptible of more than one interpretation," because "the administrative opinion is to be given weight * * * as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." *Id.* at 90-91; *id.*

at 91 (noting that an agency's "expert knowledge and judgment" can be "particularly significant" in contexts involving "complex matters"). Such "agency[] interpretations," the report observed, "may take the form of 'interpretative rules'" or administrative "rulings upon particular questions" before agencies. *Id.* at 27.

Those concepts of judicial deference have long been reflected in this Court's cases. The leading decisions of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and *Seminole Rock*, 325 U.S. at 414 (1945), for instance, were both decided more than a year before the APA's enactment. *Skidmore* taught that the "rulings, interpretations and opinions" of the Department's Wage and Hour Administrator "constitute a body of experience and informed judgment to which courts" may defer when interpreting the Fair Labor Standards Act (FLSA). See 323 U.S. at 140. *Seminole Rock*, in turn, confirmed that reviewing courts should provide a greater degree of deference to "the administrative construction of [an agency's] regulation." 325 U.S. at 414. The Court therefore followed the relevant agency interpretations of an April 1942 regulation that the agency had issued after promulgating that regulation. *Id.* at 413, 417-418 & n.8 (following May 1942 bulletin and subsequent agency interpretations of the regulation).

Seminole Rock thus teaches that courts should normally provide "substantial deference to an agency's interpretation of its own regulations" and give the agency's interpretation "controlling weight" in the adjudicatory process unless the agency's reading conflicts with "the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson*

Univ. v. *Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). But a court's decision to construe a legislative regulation by deferring to the agency's proffered reading does not mean that the interpretive rule articulating the agency's reading of its regulation has the "force of law." It is the *court* that adjudicates the regulation's meaning, and the court does so by deciding whether to adopt the agency's reading as its own by deferring to the proffered agency interpretation.

In this case, respondent now challenges only the procedure used to adopt the 2010 AI, having abandoned below its challenge to the substantive validity of that interpretation. See Gov't Br. 6-8; Gov't Cert. Reply Br. 2-3. This case therefore does not provide an occasion for this Court to determine the validity of the 2010 AI applying *Seminole Rock/Auer* deference principles—or to address more generally the framework of deference when an agency has amended its earlier interpretation of a legislative regulation. The Court has indicated, but not squarely held, that when an agency's interpretation of such a regulation has significantly changed, that change can in certain circumstances be relevant to the deference that courts will give the agency's views. See, *e.g.*, *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337-1338 (2013) (concluding that agency's "consistent" interpretation with "no indication that [the agency's] current view is a change from prior practice" was "another reason" to accord *Auer* deference); *Thomas Jefferson Univ.*, 512 U.S. at 515 (stating that "an agency's interpretation of a * * * regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view") (citation and internal quotation marks omitted); see

also *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (stating that deference can be unwarranted if there is reason to suspect that agency's interpretation does not reflect its fair and considered judgment, which "might occur when the agency's interpretation conflicts with a prior interpretation") (citing *Thomas Jefferson Univ.*, 512 U.S. at 515). And in *Seminole Rock* itself, when the Court concluded that an agency's interpretation of its own regulations warranted deference, 325 U.S. at 414, it referred to "the consistent administrative interpretation" of the regulations and found no "inconsistent [agency] interpretations," *id.* at 418 & n.9.

The Court has held, however, that an agency's change in interpretation "alone presents no separate ground for disregarding the [agency's] present interpretation" of its regulations, *Kennedy* v. *Plan Adm'r*, 555 U.S. 285, 296 n.7 (2009) (citation omitted), at least when the change does not constitute "unfair surprise," *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170-171 (2007). No "unfair surprise" will result, for example, if the agency's actions give notice that it is reconsidering its interpretive views. See *id.* at 163-164, 170-171 (according *Auer* deference to Department's interpretation of regulations in an Advisory Memorandum, notwithstanding changes in Department's interpretation, where Department initiated notice-and-comment rulemaking to reconsider its regulations but did not produce a final rule). Even without such notice, a changed interpretation need not produce an unfair surprise. In this context, for instance, Congress ensured that an employer will not incur FLSA liability if the employer's actions are "in good faith in conformity with and an in reliance" on a

relevant Department interpretation, even if a subsequent Department interpretation "modifie[s] or rescind[s]" that earlier guidance. 29 U.S.C. 259(a).

An agency must also provide a reasoned explanation for its change in interpretation in order for its revised interpretive rule to survive review for arbitrary and capricious agency action. Cf. *Fox Television Stations*, 556 U.S. at 515. The foregoing principles governing agency interpretation confirm that the availability of judicial deference to agency interpretive rules does not transform such rules into legislative rules that themselves will carry the force and effect of law.

b. Respondent's contention would also prove far too much to justify *Paralyzed Veteran*'s view that only a revised interpretive rule requires notice-and-comment rulemaking. The logical consequence of respondent's theory would seem to be that *all* agency interpretive rules construing agency regulations—including initial interpretations—are "legislative" regulations having the "force of law" and requiring notice-and-comment rulemaking because courts may give them *Seminole Rock/Auer* deference. We are aware of no court ever so holding, and indeed respondent expressly concedes (Br. 21-22) that an agency's "initial interpretation" falls within the APA's interpretive-rule "exception to notice and comment [rulemaking]" even though it may be "entitled to deference." There is no reason why the result should be different with respect to a revised interpretation, even though it too may be entitled to deference.[1]

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[1] To the extent respondent suggests (Br. 21, 48) that an agency's interpretation of a legislative regulation is itself a "legislative rule" because it "bind[s]" individuals and addresses their "legal rights

c. Respondent cites (Br. 8) an amicus brief that the Department filed in district court in another case in which the Department argued that the court should give *Seminole Rock/Auer* deference to the 2010 AI that respondent challenges here. Respondent argues (Br. 14, 37, 47) that the Department's amicus brief demonstrates that the 2010 AI is "a legislative rule" because the brief argued for "controlling" deference and acknowledged that the 2010 AI is a "substantive" change from the Department's 2006 opinion letter. But just as *Seminole Rock/Auer* deference cannot justify the *Paralyzed Veterans* doctrine, neither can an agency's legal arguments for such deference.

And in any event, the question whether notice-and-comment rulemaking was required to issue the 2010

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and obligations," respondent is mistaken. Although a legislative regulation can "affect[] individual rights and obligations," *Chrysler*, 441 U.S. at 302, that characteristic does not fruitfully distinguish interpretive rules from the underlying legislative rules they interpret. See *American Postal Workers Union* v. *USPS*, 707 F.2d 548, 560 (D.C. Cir. 1983) ("the impact of a rule has no bearing on whether it is legislative or interpretative"), cert. denied, 465 U.S. 1100 (1984); see also *Metropolitan Sch. Dist.* v. *Davila*, 969 F.2d 485, 494 (7th Cir. 1992) (same), cert. denied, 507 U.S. 949 (1993); *Chief Prob. Officers* v. *Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997) (White, J., sitting by designation) (rule's "'impact' is not a basis for finding [it] not to be interpretive"). An interpretive rule that construes the scope of a legislative regulation proscribing individual rights and obligations will, of course, express the agency's understanding of the regulation's scope, but it does not itself proscribe rights and obligations because, unlike the underlying legislative regulation, it lacks the force and effect of law. This Court in *Guernsey* thus held the interpretive rule in that case to be a "prototypical" interpretive rule even though applying the interpretation significantly affected the amount of hospitals' reimbursement. See pp. 21-22, *infra*.

AI cannot properly turn on the agency's *subsequent* statements about the deference that should be given the interpretation. Otherwise, notice-and-comment rulemaking would turn on the happenstance of agency statements about an interpretation after its issuance rather than the actual character of the interpretation itself.

4. Respondent relatedly contends (Br. 34-36) that separation-of-powers principles support the *Paralyzed Veterans* doctrine, which, in respondent's view, properly constrains agency authority "by refusing to allow agencies to take a short cut around the APA cornerstone of notice and comment" (Br. 35). But separation-of-powers principles speak to the division of authority *between* different Branches of Government, not the particular procedures that a federal agency should follow in exercising its authority. Moreover, respondent's suggestion that the *Paralyzed Veterans* doctrine prevents agencies from taking a "short cut" begs the question of what rulemaking procedures the APA requires.

C. The *Paralyzed Veterans* Doctrine Is Inconsistent With This Court's Teachings

Respondent contends (Br. 23-28) that the *Paralyzed Veterans* doctrine is "fully consistent" with this Court's decisions. That is incorrect.

As explained in our opening brief (at 27-29), the Court in *Vermont Yankee* held that Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose on agencies in conducting rulemaking" and, for that reason, a reviewing court cannot require more process even if it concludes such additional "procedures are 'best' or most likely to further

* * * [the] public good." 435 U.S. at 524, 549. Respondent appears to suggest (Br. 25) that *Vermont Yankee* prohibits a court from adding "extrinsic procedures" like "full adjudicatory" procedures but not from extending the type of "procedures provided in the APA," namely, notice-and-comment rulemaking. Section 4, however, embodies Congress's judgment that the APA's notice-and-comment procedures should *not* apply to interpretive rules even though they apply to other rules, and *Vermont Yankee* thus teaches that courts cannot force agencies to adopt such procedures that extend beyond the APA's "maximum" requirements. To the extent respondent seeks (*ibid.*) to justify *Paralyzed Veterans* as a prophylactic tool that "merely safeguards" notice-and-comment rulemaking, such an *extension* of the APA's requirements conflicts with *Vermont Yankee*'s conclusion that such policy-based judgments lie beyond the province of a reviewing court.

Respondent appears (Br. 27) to recognize that *Thomas Jefferson University* understood that an agency can alter its interpretation of a regulation without engaging in the type of notice-and-comment rulemaking needed to amend the regulation itself. See Gov't Br. 19. Respondent, however, simply disregards that conclusion as dicta without attempting to reconcile it with *Paralyzed Veterans*.

Finally, respondent suggests (Br. 23-24) that *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), supports its view. But respondent relies on a passage that offers no refuge. *Christensen* explains that the Department's interpretation of a legislative regulation expressed in an opinion letter could be given *Auer* deference "only [if] the *language* of the

regulation is ambiguous" and such deference was unwarranted because the text was clear. 529 U.S. at 588 (emphasis added). The Court noted that adopting a reading inconsistent with that text would erroneously allow "the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation," *ibid.*, but that observation simply reflects that such an agency interpretation is substantively invalid. Like *Guernsey* (see pp. 6-7, *supra*), *Christensen* does not address whether a change in an agency *interpretation* of a regulation must be issued using notice-and-comment-rulemaking procedures.

D. Respondent's Attempted Reformulation Of The Term "Interpretive Rule" Does Not Justify The *Paralyzed Veterans* Doctrine

Respondent argues (Br. 38-42) that, "at the time Congress enacted the [APA]" in 1946, Congress would have understood that the Act's exemption for "interpretive rules" would cover only "(i) non-authoritative interpretations of statutes" and "(ii) interpretations of regulations issued at the same time as the regulations themselves," Br. 38, 42 (citation omitted). That narrowed category of interpretive rules, respondent concludes (Br. 42), would "receive little if any judicial deference"; would not involve changes in interpretation; and, because the APA's notice-and-comment exception would apply only to that narrowed category, would support the *Paralyzed Veterans* doctrine by excluding from the interpretive-rule exemption the rules to which the doctrine applies. Respondent's contentions are incorrect and do not provide a sound basis for departing from the understanding that an "interpretive rule" is an "agency statement * * * designed to * * * interpret * * * law,"

5 U.S.C. 551(4), "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Guernsey*, 514 U.S. at 99 (citation omitted).

The Congress that enacted the APA would have understood that courts construing agency regulations would defer to the very type of interpretive rules that the APA exempts from notice and comment rulemaking. This Court's *Seminole Rock* decision, for instance, confirmed—prior to the enactment of the APA—that such deference principles apply on judicial review. See pp. 12-14, *supra*.

Respondent notes that interpretive rules in which an agency expresses its interpretation of substantive (legislative) regulations were recognized in a congressional hearing to be "very definitely substantive," Br. 40 (citation omitted), because such interpretations will affect individuals. Gov't Br. 22. But despite recognizing as much, a central figure in the APA's development (Carl McFarland) testified that the APA's notice-and-comment-rulemaking requirement should be limited to the substantive regulations and not the interpretive rules. See *ibid.* Congress adopted McFarland's recommendation. This Court accordingly concluded in *Guernsey* that an agency interpretive rule (PRM § 233) construing Medicare reimbursement regulations was a "prototypical example of an interpretive rule" that did "not require notice and comment," 514 U.S. at 99, notwithstanding the hospital's contention that it should be deemed a legislative rule requiring notice and comment because it affected the hospital's "reimbursement rights" and had been invoked by the agency to deny Medicare payments.

See Resp. Br. at 46-48, *Guernsey*, *supra* (No. 93-1251).[2]

Congress thus would reasonably have understood that its notice-and-comment exemption for interpretive rules would cover interpretations of regulations to which courts would give *Seminole Rock* deference, even though those interpretations would reflect agencies' understanding of the scope of legislative regulations affecting individuals' rights and obligations. See also p. 16 n.1, *supra* (interpretive rules construing the scope of legislative regulations affecting individual rights and obligations are not themselves legislative). The APA's definition of "rule making," moreover, demonstrates that Congress would have understood that exemption to extend not only to initial agency interpretations but also to subsequent "amendments" or "repeals" of agency interpretations of regulations. See p. 4, *supra*. Respondent thus provides no sound basis for adopting its constrictive view of "interpretive rules" under the APA or its corresponding reconceptualization of the *Paralyzed Veterans* doctrine.

E. Respondent's Policy Contentions Lack Merit

Finally, respondent argues (Br. 28-34) that *Paralyzed Veterans*' imposition of notice-and-comment-rulemaking procedures promotes "[g]ood [g]overn-

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[2] Respondent suggests (Br. 44) that the definition of "regulation" and "rule" used by Executive Order No. 12,866, § 3(d), 3 C.F.R. 641 (1993 comp.), reprinted as amended at 5 U.S.C. 601 note, supports its position. But that definition captures only a subset of the "rule[s]" within the APA's definition of the term, namely, certain rules that "the agency *intends* to have the force and effect of law," *ibid.* (emphasis added), and that therefore could be expected to proceed through notice-and-comment rulemaking. It is these potential rules that are reviewed pursuant to the Order.

ment" by providing advance notice of interpretive changes and protecting reliance interests. Respondent further argues (Br. 29-31, 33) that the government's concerns with the doctrine (Gov't Br. 24-26) are misplaced and that Congress's selection of notice-and-comment-rulemaking as the APA's "default rule" shows that Congress favored those procedural protections over agency flexibility. Respondent is incorrect.

Congress's creation of an express and unqualified exemption from notice-and-comment rulemaking for interpretive rules reflects the balance that Congress struck between agency flexibility and mandatory procedural devices for such rulemaking. The mandatory imposition of additional procedural requirements would by definition lead to greater public involvement in the rulemaking process, but mandatory procedures across all rulemaking contexts come at a significant cost to agency time and resources and the prompt correction of erroneous interpretations. Congress thus made the judgment that the formulation, amendment, and repeal (5 U.S.C. 551(5)) of agency interpretive rules should be categorically exempt from the APA's otherwise mandatory notice-and-comment provisions in order to provide agencies greater flexibility in that specific context and facilitate the public's prompt access to current agency interpretations. See Gov't Br. 22-24. The relevant Committee Reports thus emphasize that the rulemaking exemption for interpretive rules does not reflect a judgment that agencies "should not undertake public procedures in connection with such rule making where useful to them or helpful to the public," but rather Congress's determination that "[a]gencies [be] given discretion" to decide on a case-by-case basis in which particular

contexts they should dispense with or utilize public procedures. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946); accord S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945).

This Court has therefore determined that the APA's rulemaking provision shows that "Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed." *Vermont Yankee*, 435 U.S. at 546. The D.C. Circuit's *Paralyzed Veterans* doctrine disregards that congressional judgment and erroneously "stray[s] beyond the judicial province" by imposing "its own notion of which procedures are 'best' or most likely to further * * * [the] public good," *id.* at 549.[3]

We note that Congress was not unmindful of the potential impact of agency interpretive changes in the FLSA minimum-wage and overtime context. Congress has made clear that an employer who acts "in good faith in conformity with and in reliance on any written administrative * * * interpretation" of the Administrator of the Wage and Hour Division that has been "modified or rescinded" shall *not* be liable for any resulting minimum-wage or overtime liability. 29 U.S.C. 259(a) and (b)(1); see Gov't Br. 4.

* * * * *

In short, this Court should now reject the *Paralyzed Veterans* doctrine and confirm that Congress meant what it said in the APA: The formulation,

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[3] Respondent asserts (Br. 49 n.10) that four courts of appeals follow *Paralyzed Veterans* and that no circuit has held otherwise. That is incorrect. See 13-1041 Pet. 16-19 & nn.5-6 (two-to-two division of authority).

amendment, and repeal of interpretive rules do not require notice-and-comment rulemaking.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 2014

REPLY BRIEF

No. 13-1052

In The Supreme Court of the United States

JEROME NICKOLS, RYAN HENRY, and BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

I. MORTGAGE BANKERS' ARGUMENTS ARE NOT SUPPORTED BY THE RECORD 2

II. THE COURT SHOULD LIMIT ITS REVIEW TO THE ISSUES ADDRESSED BELOW 5

III. THE *PARALYZED VETERANS* DOCTRINE CONFLICTS WITH THE APA 7

A. Respondent Would Depart Significantly from This Court's Settled Understanding of Interpretive Rules 8

B. Respondent's Argument Is Inconsistent with This Court's Understanding of Legislative Rules 9

C. An Agency Does Not Amend Its Regulations When It Modifies Its Interpretations 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) 1, 11

Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993) 6

Auer v. Robbins, 519 U.S. 452 (1997) 3, 13, 14, 15

Batterton v. Francis, 432 U.S. 416 (1977) 14

Casas v. Conseco Fin. Corp., No. Civ.00-1512, 2002 WL 507059 (D. Minn. Mar. 31, 2002) 3

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 15

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 8, 9, 10, 13, 16

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) 6

Heckler v. Campbell, 461 U.S. 458 (1983) 6

Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996) 10

Miller v. Cal. Speedway Corp., 536 F.3d 1020 (9th Cir. 2008) 10

Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997) ..... *passim*

Scenic Am., Inc. v. U.S. Dep't of Transp., ___ F. Supp. 2d ___, 2014 WL 2803084 (D.D.C. June 20, 2014) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87 (1995) 8

Transp. Workers Union of Am., AFL-CIO v. TSA, 492 F.3d 471 (D.C. Cir. 2007) 1, 5

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) 16

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 16

STATUTES

5 U.S.C. § 553 1

15 U.S.C. § 78n 9

29 U.S.C. § 213 4

REGULATIONS

17 C.F.R. § 240.14a-4 9

29 C.F.R. § 541.203 3

OTHER ADMINISTRATIVE AND EXECUTIVE MATERIALS

3 Fed. Reg. 2518 (Oct. 20, 1938) 2

14 Fed. Reg. 7705 (Dec. 24, 1949) 2

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541) 3

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 8

Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971) 3

Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999) 3

OTHER SECONDARY MATERIALS

Kenneth Davis & Richard Pierce, *Administrative Law Treatise* (3d ed. 1994) 14

Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515 (2011) 14

Charles Alan Wright & Charles H. Koch, Jr., 32 Federal Practice & Procedure § 8155 (1st ed.).....7

REPLY BRIEF FOR PETITIONERS

The unambiguous text of the Administrative Procedure Act ("APA") exempts interpretive rules from notice-and-comment rulemaking. 5 U.S.C. § 553(b). Under the D.C. Circuit's *Paralyzed Veterans* doctrine, however, "an agency cannot significantly change its position . . . *even between two interpretive rules*, without prior notice and comment." *Transp. Workers Union of Am., AFL-CIO v. TSA*, 492 F.3d 471, 475 (D.C. Cir. 2007) (emphasis added). This is so, according to the D.C. Circuit, because when an agency "significantly revises [its initial] interpretation, the agency has in effect amended its rule." *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

Respondent Mortgage Bankers Association refuses to defend the *Paralyzed Veterans* doctrine on its own terms. Instead, Respondent attacks the doctrine's premise that the agency's revised interpretation qualifies as an "interpretive rule" in the first place. In so doing, Respondent asks this Court to depart significantly from its settled understanding of interpretive rules and consider arguments that were neither raised nor passed on below.

This Court should decline Respondent's invitation. The Department of Labor ("DOL") in 2010 validly – and correctly – interpreted the agency's own regulations to give mortgage loan officers the protections afforded by the Fair Labor Standards Act ("FLSA"). Because the APA does not require notice-and-comment rulemaking before issuing such an interpretive rule,

the D.C. Circuit's decision in this case must be reversed.

I. Mortgage Bankers' Arguments Are not Supported by the Record.

Before responding to Mortgage Bankers' arguments, it is necessary to clarify a few points about the record in this case.

Mortgage Bankers predicates its argument on a hypothetical set of facts that goes something like this: a federal agency, seeking to maximize its own power, issues a hopelessly vague regulation. Regulated parties, unsure how the regulation applies to their circumstances, seek to learn how the agency will apply the regulation in practice. The agency issues an interpretation addressing the regulated parties' question, and private parties rely heavily on that interpretive answer. Later, the agency, in a fit of caprice and without explanation, changes its interpretation.

This case tells a very different story. The DOL first issued FLSA regulations over seventy-five years ago. 3 Fed. Reg. 2518 (Oct. 20, 1938). Those regulations have served admirably as a clear and durable guide to employers and employees, and the substance of the relevant regulations has remained unchanged since 1949. 14 Fed. Reg. 7705 (Dec. 24, 1949). Through the years, the agency has consistently treated loan officers as sales employees – eligible for the outside

sales exemption but ineligible for the administrative exemption.[1]

Respondent Mortgage Bankers did not approach the DOL in 2005 in order to clarify some regulatory ambiguity. Mortgage Bankers sought to *change* the agency's established interpretation to benefit its members in ongoing litigation. The incentive to do so was obvious. Mortgage Bankers' members could (and did) hold up the 2006 interpretation in court, demand deference under *Auer v. Robbins*, and claim immunity

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[1] Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, WH-115, 1971 WL 33052 (Jan. 15, 1971), App. 72a; Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1999 WL 1002401 (May 17, 1999), App. 75a. The agency last revised its regulations in 2004, but did not change the substance of the administrative exemption, and thus did not undermine the vitality of the agency's pre-existing interpretations. *See* Br. for Respondent Mortg. Bankers Ass'n at 3. The agency did add a new provision addressing the application of the administrative exemption to employees in the financial services industry. *See* 29 C.F.R. § 541.203(b). That section explained that while employees could qualify for the exemption if they "analyz[ed]" investments, "advis[ed] the customer" regarding financial options, and engaged in "marketing, servicing or promot[ion]" work, "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *Id.* The agency cited numerous examples of both exempt and nonexempt employees, but specifically identified *loan officers* as the prime example of employees whose primary duty is selling financial products. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22,145 (citing *Casas v. Conseco Fin. Corp.*, No. Civ.00-1512, 2002 WL 507059, at *9 (D. Minn. Mar. 31, 2002)).

from liability under the Portal-to-Portal Act's good faith defense.

When the DOL acted in 2010 to restore its original interpretation, the agency was not, as Respondent suggests, engaged in policymaking under the guise of interpretation. The agency was correcting a mistake – revoking a short-lived and legally erroneous interpretation widely understood to be the unfortunate (but fortunately, rare) product of regulatory capture. *See* R. Intervenors' Mem. Opp'n Summ. J., Ex. 10 at 7, 17, ECF No. 30-10 (Murphy, J.) (calling the 2006 interpretation "a novel approach toward settled law" and "the only exception to the entire statutory regulatory case law scheme that we've seen interpreting 29 U.S.C. 213(a)(1) through regulation and case law in the entire time that the statute has been in place.").

Mortgage Bankers ignores this history. It ignores the fact that the agency acted reasonably to fix a legal error. It ignores the extent to which existing protections – most prominently arbitrary and capricious review – already prevent agencies from engaging in the sort of heavy-handed conduct Mortgage Bankers hypothesizes. Most fundamentally, Mortgage Bankers ignores its own conduct in this case. Respondent insists that *Paralyzed Veterans* is necessary to "prevent[ ] agencies from unseemly flip-flopping," Br. for Respondent Mort. Bankers Ass'n at 13, but fails to explain why the DOL's first flip flop – caused by Respondent – should be treated any differently. It should not. When an agency issues an interpretive rule, notice-and-comment rulemaking is not required.

II. THE COURT SHOULD LIMIT ITS REVIEW TO THE ISSUES ADDRESSED BELOW.

Respondent's arguments to this Court share a crucial premise: that the DOL's 2010 interpretation was a legislative – not an interpretive – rule. But this argument suffers from a serious problem. The *Paralyzed Veterans* doctrine, as articulated by the D.C. Circuit, is based on the opposite premise: that "an agency cannot significantly change its position . . . *even between two interpretive rules*, without prior notice and comment." *Transp. Workers Union of Am.*, 492 F.3d at 475 (emphasis added).[2]

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[2] The D.C. Circuit has always treated as conceptually distinct the questions of (1) whether an agency pronouncement is legislative, and, if not, (2) whether that pronouncement is nevertheless invalid under the *Paralyzed Veterans* doctrine. One recent case, *Scenic America, Inc. v. United States Department of Transportation*, helpfully illustrates the circuit's settled approach. ___ F. Supp. 2d ___, 2014 WL 2803084 (D.D.C. June 20, 2014). In that case, an environmental group sought to invalidate an agency document permitting states to allow the construction of digital billboards along interstate highways. *Id.* at *1-3. The plaintiff first asserted that the agency document amounted to a legislative rule. *Id.* at *3. That assertion required the court to apply the circuit's familiar four factor test, which asks:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

(Continued on following page)

Compounding the problem, Mortgage Bankers fully embraced the D.C. Circuit's premise below, stating that "[e]ven if [a] pronouncement can be considered an interpretative rule, it still may be subject to notice-and-comment rulemaking[ ] under *Paralyzed Veterans* and its progeny." R. Plaintiff's Reply Mem. Supp. Summ. J. at 7 n.10, ECF No. 17. Mortgage Bankers never argued below that the agency's 2010 interpretation amounted to a legislative rule. And as a consequence of that choice, the argument was not addressed by Petitioners, the district court, or the court of appeals.

This Court considers grounds in support of a judgment not raised below only in extraordinary cases. *See Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983). Because Mortgage Bankers failed to argue below that the DOL's 2010 interpretation amounted to a legislative rule, the argument is waived. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (finding waiver where a party failed to challenge circuit precedent holding

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Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) *cited in Scenic America*, 2014 WL 2803084, at *5. Applying this test, the *Scenic America* court determined that the agency pronouncement was an interpretive – not legislative – rule. 2014 WL 280308 at *10. But that conclusion meant the court had to confront the challenger's second argument: that an agency's interpretation "may nevertheless be subject to the APA's notice-and-comment requirements under the [*Paralyzed Veterans*] doctrine," because "an agency must still use notice-and-comment procedures to issue an interpretative rule when that rule" significantly revises a prior interpretation. *Id.*

that an unaccepted Rule 68 offer mooted an individual claim).

And even setting aside general waiver principles, there are compelling reasons to proceed cautiously here. The circuit courts apply a variety of tests to determine whether a rule is legislative or interpretive. *See* 32 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice & Procedure § 8155 (1st ed.). While that question may require this Court's attention in a future case, it would be imprudent to pass on the question here without the benefit of full briefing and opinions below.

This Court should instead proceed from the same premise accepted by the parties and courts below – that the DOL's 2010 interpretation is an interpretive rule – and determine whether notice-and-comment rulemaking was still required under the terms of the *Paralyzed Veterans* doctrine.

III. THE *PARALYZED VETERANS* DOCTRINE CONFLICTS WITH THE APA.

Even if this Court considers Respondent's arguments in full, the result would be the same. The DOL's 2010 interpretation fully qualifies as an "interpretive rule" exempt from notice and comment under the APA.

A. Respondent Would Depart Significantly from This Court's Settled Understanding of Interpretive Rules.

Respondent first suggests that this Court abandon its established definition of interpretive rules. Under this Court's precedent, interpretive rules are rules "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n.31 (1979) (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

Mortgage Bankers proposes a wholesale change to the APA's definition of interpretive rules. Under Mortgage Bankers' proposal, interpretive rules would encompass only "(i) non-authoritative interpretations of statutes, or (ii) interpretations of regulations issued *at the same time as the regulations themselves*." *See* Br. for Respondent Mortg. Bankers Ass'n at 42 (emphasis added). But the APA admits no such temporal limitation on interpretive rules. Indeed, such a limitation would effectively prevent agencies from responding to public inquiries over how a regulation might apply to unforeseen circumstances, undermining the agency's ability to "advise the public" – the very rationale for exempting interpretive rules from notice and comment in the first place. In any event, Mortgage Bankers' proposed definition, if accepted, would not vindicate Respondent's position in this case. Neither the 2006 nor the 2010 interpretation

(nor, for that matter, the DOL's prior interpretations) was issued contemporaneously with the relevant FLSA regulations.

B. Respondent's Argument Is Inconsistent with This Court's Understanding of Legislative Rules.

The 2010 interpretation's proper status as an interpretive rule is further demonstrated by the Court's characterization of legislative rules. This Court has cited "the proxy rules issued by the Securities and Exchange Commission" as the prime example of legislative rules. *Chrysler Corp.*, 441 U.S. at 302-03. Section 14(b) of the Securities Exchange Act prohibits certain persons from giving or withholding a proxy "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(b)(1). The statute itself creates no independently enforceable rights, duties, or obligations. When the agency, through its regulations, declares that the form of proxy "shall indicate in bold-face type whether or not the proxy is solicited on behalf of the registrant's board of directors," 17 C.F.R. § 240.14a-4(a), the agency is exercising legislative power delegated by Congress. The legal norms contained in the proxy regulation are created from whole cloth (but pursuant to congressional authority); they cannot be independently ascertained by interpreting any pre-existing legal source. "[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes . . . an agency to impose a duty, the formulation

of that duty becomes a legislative task entrusted to the agency." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169 (7th Cir. 1996) (Posner, C.J.).

If the Commission later opines that twelve-point, bolded Century Schoolbook font does (or does not) satisfy the proxy regulation's requirements, such a statement would qualify as an interpretive rule, issued to "advise the public of the agency's construction" of the "rules which it administers." *Chrysler Corp.*, 441 U.S. at 302, n.31. Interpretation "is the ascertainment of meaning." *Hoctor*, 82 F.3d at 170. "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule[.]" *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008).[3]

The foregoing legal principles dictate a straightforward result in this case: (1) the FLSA is a statute, (2) the regulations contained in the Code of Federal Regulations "defining and delimiting" the scope of the statute's exemptions are legislative rules, and (3) the agency's interpretations explaining how the regulations apply to various workplace scenarios are interpretive rules.

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[3] Of course, an agency remains free to elevate an otherwise valid interpretive rule to the status of legislative rule. To do so, however, the agency must first subject the interpretation to the heightened procedural requirements contained in the APA, including notice-and-comment rulemaking.

C. An Agency Does Not Amend Its Regulations When It Modifies Its Interpretations.

This seemingly straightforward result faces one last hurdle: the D.C. Circuit's insistence that when an agency "significantly revises [its initial] interpretation, the agency has in effect amended its rule." *Alaska Hunters*, 177 F.3d at 1034. But that simply isn't so. An agency's interpretation of its regulation no more changes the meaning of the regulation than a court's interpretation of a statute amends the statute. And just as courts from time to time find it necessary to change or reverse erroneous interpretations, so too agencies must occasionally correct course on their own interpretive rules. A changed interpretation is still an interpretation, not an act of legislation.

Recognizing this shortfall, the panel below offered a doctrinal fix. The court called the *Paralyzed Veterans* doctrine's "operative assumption" "the belief that a definitive interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013), App. 5a.

But the D.C. Circuit's "closely intertwined" assumption suffers from fatal flaws of its own. In order to make the *Paralyzed Veterans* doctrine work in practice, its defenders must establish three things: first, that the agency's initial interpretation qualifies as an interpretive rule; second, that at some point,

and by some mechanism, that initial interpretation calcifies into part of the regulation itself; and third, that a subsequent interpretation, by modifying the original interpretation, amends the (now modified) regulation.

The doctrine's assumption that an *initial* interpretation may be issued as a valid interpretive rule is correct as far as it goes. But the point exposes the doctrine's key flaw: its asymmetrical treatment of agency interpretations. Simply put, if the initial interpretation is to carry the force and effect of law, such that it cannot be changed without notice and comment, then the *initial interpretation itself* must be the product of notice and comment. The converse is equally true: if an agency's initial interpretation qualifies as an interpretive rule lacking the force and effect of law, then a later-in-time interpretation modifying the original interpretation does not change any of the substantive regulations and therefore need not follow notice-and-comment rulemaking. The *Paralyzed Veterans* doctrine thus rests on an illusion, a sort of Venn diagram where the circles fail to intersect. An interpretation cannot be simultaneously interpretive (for purposes of issuance) and also legislative (for purposes of repeal). But *Paralyzed Veterans* compels adherence to this failed logic.

The doctrine's second assumption – that an initial interpretation somehow morphs into part of the regulation itself, is equally flawed. An agency's interpretation of its own regulations achieves the force and effect of law through – and only through –

the process of notice-and-comment rulemaking. *See Chrysler Corp.*, 441 U.S. at 302-03. Mortgage Bankers, for its part, never fully explains how or why (or when) an interpretive rule loses its interpretive status. Mortgage Bankers at times suggests the change is instantaneous. *See* Br. for Respondent Mortg. Bankers Ass'n at 45 ("[T]he prior interpretation essentially 'finishes the job' of creating the regulation itself."). But Mortgage Bankers later concedes that an agency would not be estopped from revoking an errant interpretation after one month. *Id.* at 31-32. Respondent at other times suggests that an interpretive rule can become legislative "over the course of years of consistent application." *Id.* at 18. But this, too, is a non-sequitur. Applying the law one, ten, or a thousand times does not change the law itself. The text of the APA suggests a simple and straightforward standard: an agency can enact, or repeal, a formal regulation only through the process of notice-and-comment rulemaking; an agency can issue, or repeal, an interpretative rule without notice-and-comment rulemaking. Mortgage Bankers' alternative is not so much an unworkable set of standards as the absence of standards altogether. Under Respondent's conception of the *Paralyzed Veterans* doctrine, an agency can sometimes change its interpretations and sometimes not, because some interpretations effectively become part of the regulations while others do not. The APA's drafters knew better than to follow this course.

Mortgage Bankers casts the *Paralyzed Veterans* doctrine as a corollary of *Auer v. Robbins*, 519 U.S.

452 (1997). But this argument, too, misses the mark. An interpretive rule's potential eligibility for deference does not act as a stand-in for having the force and effect of law. There is an enormous theoretical and practical difference between formal regulations, which "bind[ ] members of the public, the agency, and even the courts," Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 233 (3d ed. 1994), and interpretive rules, which may (or may not) command some level of judicial deference. "[A] court is not required to give effect to an interpretative [rule]." *Batterton v. Francis*, 432 U.S. 416, 424-26, n.9 (1977). Instead, "[v]arying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Id.*

Practical experience demonstrates the real-world significance of the distinction. In one recent study, the authors concluded that lower federal courts upheld agency interpretations in seventy-six percent of cases where *Auer* deference was sought – a number not materially different from the seventy percent of cases where courts affirmed agency action using traditional interpretive tools. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 519 (2011).[4]

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[4] The potential for *Auer* deference is a particularly poor justification for the *Paralyzed Veterans* doctrine because *Auer*

(Continued on following page)

Mortgage Bankers spends considerable energy focusing on the potential practical effects of agency interpretations. But such practical effects do not confer legislative status on otherwise interpretive rules.

There is no question that interpretive rules, although lacking the force and effect of law, have real-world consequences. Interpretations can clarify important duties, create norms of conduct between regulated parties, and engender reliance interests and investment-backed expectations. And Petitioners understand – keenly – the frustration that occurs when an agency changes its interpretation.

But these frustrations do not come with a license to rewrite the plain language of the APA. Instead, such concerns are best addressed on a case-by-case basis using the legal tools designed to prevent arbitrary agency conduct and to protect private parties from unforeseen interpretive shifts. *See* Br. for Petitioners Nickols, et al. at 41-48 (explaining that arbitrary and capricious review, judicial deference doctrines, statutory safe harbors, and due process, among others, adequately protect regulated communities for

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deference is frequently not warranted "when the agency's interpretation conflicts with a prior interpretation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citing *Auer*, 519 U.S. at 462). Respondent fails to explain why an initial interpretation – far more likely to be eligible for *Auer* deference – may be issued without notice and comment, but a revised interpretation – much less likely to receive *Auer* deference – must follow notice-and-comment rulemaking procedures.

unfair and unforeseen shifts in agency interpretations).

CONCLUSION

The APA is "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)). In many ways, Mortgage Bankers seeks to reopen the ten-year debate that preceded the APA's enactment and impose procedural constraints beyond those Congress saw fit to write into law. But this Court has repeatedly cautioned that it is courts' role to interpret the APA as written – not to take sides in that long-continued debate or second-guess Congress' judgment. *See id.*; *Chrysler Corp.*, 441 U.S. at 313. The *Paralyzed Veterans* doctrine is incompatible with the text of the APA and unfaithful to the careful balance struck by Congress. Petitioners respectfully ask this Court to reverse the court of appeals.

Respectfully submitted.

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November 2014

AMICUS CURIAE BRIEF

Nos. 13-1041, 13-1052

IN THE

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,
Respondent.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AND HEALTHCARE FINANCIAL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

AFTER DECADES OF CONSISTENT PRACTICE ON HOW NONPROFIT RESEARCH HOSPITALS CAN QUALIFY FOR OR CONFIRM TAX EXEMPTION, THE IRS RECENTLY AND RETROACTIVELY REVERSED ITS POLICY THROUGH AN INTERPRETIVE RULE. 9

A. For Decades, IRS Revenue Rulings Have Governed Tax Exemption for Nonprofit Hospitals and Recognized the Relevance of All Medical Research, Regardless of Funding Source. 10

B. In 2008, After Seeking Public Comments on the Community Benefit Standard, the IRS Reconfirmed the Relevance of All Medical Research Regardless of Funding Source. 12

C. In December 2013, the IRS Changed Its Rule on Medical Research Expenditures Retroactively, Without Notice, Explanation, or Relief for Past Reliance. 16

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

City of Richmond v. Richmond Mem'l Hosp.,
116 S.E.2d 79 (Va. 1960) 11

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515 U.S. 323 (1995) 10

Paralyzed Veterans of Am. v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) 4

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 10

STATUTES

5 U.S.C. § 551(4) 5

5 U.S.C. § 553(b) 5

IRC § 501(a) 10

IRC § 501(c)(3) 10

IRC § 6104(b) 13

IRC § 6652(c) 18

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2008 Schedule H (Form 990)
Instructions – Draft, April 7, 2008 ..... 15, 17

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(continued)

Page(s)

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(continued)

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(continued)

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Press Release, NIH Grant to Support Mount Sinai Research Program to Create Biological Network Model of Alzheimer's Disease in Partnership with New York Stem Cell Foundation (Sept. 18, 2013) 8

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Rev. Rul. 56-185, 1956-1 C.B. 202 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Rev. Rul. 69-545, 1969-2 C.B. 117 11

Rev. Rul. 83-157, 1983-2 C.B. 94 11

Treas. Reg. § 601.601(d)(2)(i)(a) 10

STATEMENT OF INTEREST[1]

The American Hospital Association, Association of American Medical Colleges, and Healthcare Financial Management Association respectfully submit this brief as *amici curiae.*

The American Hospital Association (AHA) represents nearly 5,000 hospitals, health systems, and other health care organizations, plus 43,000 individual members. AHA members are committed to improving the health of the communities they serve and to helping ensure that care is available to, and affordable for, all Americans. The AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health care policy.

The Association of American Medical Colleges (AAMC) is a nonprofit educational association whose members include all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. Through these institutions and organizations, the AAMC represents 128,000 faculty members, 83,000 medical students, and 110,000 resident physicians. Founded in 1876, the AAMC, through its many programs and services, strengthens the world's most advanced medical care by supporting the entire spectrum of education, research, and patient care activities conducted by its

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

member institutions. The AAMC's mission is to serve and lead the academic medicine community to improve the health of all.

The Healthcare Financial Management Association (HFMA) is the nation's leading membership organization for more than 40,000 healthcare financial management professionals. Its members are widely diverse, employed by hospitals, integrated delivery systems, managed care organizations, ambulatory and long-term care facilities, physician practices, accounting and consulting firms, and insurance companies. As part of its education, information, and professional development services, HFMA develops and promotes ethical, high-quality healthcare finance practices. HFMA works with a broad cross-section of stakeholders to improve the healthcare industry by identifying and bridging gaps in knowledge, best practices, and standards.

Amici have a specific interest in this case because their members are subject to the wide variety of interpretive rules issued by federal agencies, including the Internal Revenue Service (IRS). These rules affect *amici*'s members significantly—and often depart dramatically from Petitioners' overly modest portrayal of the nature and purpose of interpretive rules. AHA, AAMC, and HFMA accordingly wish to illustrate both the breadth of agency action that may be implicated by this Court's ruling, as well as how agencies vary in their handling of such rules.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners paint an exceedingly narrow picture of interpretive rules, under which such rules play only an ancillary role in an agency's regulatory agenda.

Under Petitioners' accounts, an agency's real work is done via legislative rules, which are promulgated through formal notice-and-comment procedures and bind citizens with "the force and effect of law." *E.g.*, Fed. Petitioners' Br. at 11. Interpretive rules, as Petitioners put it, function "simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions." *Id.* at 21; *see also, e.g.*, Private Petitioners' Br. at 51 ("[I]nterpretive rules *merely reflect* the agency's present belief concerning the meaning of the statutes and regulations administered by the agency") (emphasis added) (internal quotation marks and brackets omitted).

Under this view, there is no actual need for interpretive rules. Such rules are more informative than regulatory: They are merely a way by which agencies provide optional insight into their thinking. *See, e.g.*, Fed. Petitioners' Br. at 24 ("Precluding an agency from publicly announcing an interpretive rule does not alter the agency's expert understanding of its legislative regulations."). According to Petitioners, then, the rule invoked below by the D.C. Circuit wrongly "requires an agency to undertake notice-and-comment rulemaking *simply to explain to the public* that the agency has corrected or revised its previous legal interpretation of a regulation in some significant way—even if no one has ever relied on the prior interpretation." *Id.* at 14 (emphasis added).

But Petitioners offer far too modest an account of agency action taken without notice-and-comment procedures. Agency action undertaken as an interpretive rule does much more than "simply explain to the public" how the agency understands

the law. Such action can and does impose real change on regulated entities, change that can be a wholesale reversal of longstanding agency policy, including policy originally adopted through more formal procedures.

Moreover, although Petitioners emphasize that the D.C. Circuit's *Paralyzed Veterans* doctrine can require notice-and-comment procedures to revise a rule when such procedures are not needed to issue the rule in the first instance, *see, e.g.*, Private Petitioners' Br. at 5 (discussing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)), agencies often *choose* to use procedures more formal than needed for issuance. To the extent there is anything anomalous about the D.C. Circuit's rule, then, the opposite rule would be equally irregular: agencies that solicited and accounted for the public's comments when issuing a rule could revise or revoke the rule on a moment's notice, with no public input at all.

This concern is not just hypothetical—as *amici*'s members can attest. As described below, the IRS recently revised its longstanding position on how to demonstrate whether nonprofit hospitals qualify for tax-exempt status. For decades, under the "community benefit" standard, medical and medically related research activities counted as evidence of community benefit regardless of whether the research was funded by restricted (i.e., funds given for specific research) or unrestricted grants. In 2013, however, the IRS summarily reversed its long-held position. Now, hospitals must treat restricted research grants as what is called "direct offsetting revenue," which effectively means that such grants

are excluded from hospitals' "community benefit" contribution. This results in a reduced and inaccurate picture of the actual "community benefit" provided by a hospital. The IRS accomplished this very significant policy reversal—having reconfirmed the policy just a few years earlier following a public comment period—through a revision to the *instructions* for a tax form in December 2013.[2] Worse still, the IRS is applying the change retroactively to all of 2013, and finalized its rule reversal less than two weeks after issuing a draft of the new instructions, without ever once explaining the change or taking account of the impact on and views of affected parties.

This unexpected about-face departs dramatically from Petitioners' paradigm for revised interpretive rules. Far from this being the IRS "merely" keeping the public informed about how it is applying the law, this rule directly changes how hospitals must calculate their "community benefit" on IRS tax forms. Moreover, the IRS's precipitous decision to jettison the old rule directly and adversely impacts hospitals that provide a share of their "community benefit" through medical or related research. It will now appear (erroneously) to communities, local, state, and even federal officials as a retrenchment in these hospitals' commitment to community benefit, which

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[2] The instructions appear to be an "interpretive rule" under the APA, as they constitute "an agency statement of general or particular applicability and future effect designed to . . . interpret . . . law or policy," 5 U.S.C. § 551(4)—here, what the term "charitable" means for a hospital. But even if the instructions might be classified differently (e.g., as a "rule[] of agency organization, procedure, or practice," under 5 U.S.C. § 553(b)(3)(A)), they nonetheless are binding on hospitals.

could confuse the public and trigger government audits, potentially imperiling hospitals' tax-exempt status.

Yet the agency's fundamental change to what constitutes "community benefit" was accomplished without formal notice and comment. This dramatically illustrates that agencies can and do effect significant change through all kinds of actions short of notice-and-comment rulemaking. Interpretative rule changes are thus not always as modest as Petitioners suggest—and can vary significantly in their impact and implementation.

ARGUMENT

The IRS's recent reversal on what constitutes hospitals' "community benefit" is an example of a significant change in agency position implemented through an interpretive rule—here, a revision of an instruction for completing a form.

For nearly a half century, nonprofit hospitals have been able to treat medical research activities, regardless of whether funded by restricted or unrestricted grants, as a "community benefit" when seeking or confirming tax-exempt status. In 2008, the IRS confirmed that very point after soliciting and accounting for public comments and conducting an extensive examination of the issue. But in 2013, by revising an instruction to a tax form, the IRS abruptly and with no notice reversed course. Now, for the first time—and in stark contrast with decades of past practice—the IRS will not treat medical research funded through restricted grants as a "community benefit." Restricted grants are those in which the project or activity to be undertaken is

specified, e.g., a grant to study some aspect of breast cancer.

This is no small matter. Restricted grants are central to medical research in this country. Every dollar expands the research in which institutions can engage. For example, the National Institutes of Health (NIH) is the world's "largest source of funding for medical research," and "invests nearly $30.1 billion annually in medical research for the American people." About NIH, http://www.nih.gov/about;[3] NIH Budget, http://www.nih.gov/about/budget.htm; *see also* Congressional Research Service, Brief History of NIH Funding: Fact Sheet (Dec. 23, 2013). Over 80% of that sizable budget funds third-party research, including by nonprofit hospitals. *See id.* Indeed, in 2013, the ten hospitals that received the most NIH funds were all nonprofit hospitals, and together received over $1 billion in grants.[4] And this and all other NIH-supported research is funded primarily through what the IRS now labels restricted grants.[5]

This funding fuels important research into cancer, cardiovascular disease, diabetes, AIDS, and scores of other health problems confronting our communities, nation, and, indeed, the world. *See, e.g.*, Our Health,

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[3] This and all other websites cited in this brief were last visited on October 13, 2014.

[4] These and other statistics on NIH grants are available from the NIH RePORT database. *See* NIH Research Portfolio Online Reporting Tools, http://projectreporter.nih.gov/reporter.cfm.

[5] *See* NIH Grants Policy Statement, http://grants.nih.gov/grants/policy/nihgps_2013/index.htm; Glossary of NIH Terms, http://www.grants.nih.gov/grants/glossary.htm (defining a "grant" as focused on "an approved project or activity").

http://www.nih.gov/about/impact/health.htm. For example—and to pick only a tiny sampling of the enormous body of NIH-funded research—the NIH recently funded projects to find new ways to delay and prevent type 1 diabetes,[6] to develop treatments for the Ebola virus,[7] to identify potential cellular and molecular targets for Alzheimer's disease therapies,[8] and to improve the prompt detection of severe brain injuries.[9]

The sea change in IRS policy on restricted grants has immediate ramifications for nonprofit research hospitals. These hospitals' reported community benefit expenditures will decline, often quite

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[6] Press Release, University of Chicago Medicine and Advocate Children's Hospital Receive $1.2 Million NIH Grant to Establish the First Type 1 Diabetes TrialNet Center in Chicago (Aug. 12, 2014), *available at* http://www.uchospitals.edu/news/2014/20140812-diabetes.html.

[7] Charles Moore, Ebola Treatment Target of $28 Million NIH Award, BioNews Texas (Mar. 24, 2014), *available at* http://bionews-tx.com/news/2014/03/24/ebola-treatment-target-28-million-nih-award.

[8] Press Release, NIH Grant to Support Mount Sinai Research Program to Create Biological Network Model of Alzheimer's Disease in Partnership with New York Stem Cell Foundation (Sept. 18, 2013), *available at* http://www.mountsinai.org/about-us/newsroom/press-releases/nih-grant-to-support-mount-sinai-research-program-to-create-biological-network-model-of-alzheimers-disease-in-partnership-with-new-york-stem-cell-foundation.

[9] Press Release, TGen, Barrow Neurological Institute and Phoenix Children's Hospital Receive $4 Million Grant to Study Genetic Basis of Brain Injuries (Dec. 4, 2013), *available at* https://www.tgen.org/home/news/2013-media-releases/$4-million-nih-grant-to-tgen-barrow-pch-to-study-brain-injuries.aspx.

precipitously, and perhaps enough to trigger audits. And federal law requires nonprofit hospitals' tax forms to be made public, both by the IRS and by the hospitals themselves—such that a sudden drop in community benefit expenditures will confuse the public and invite government scrutiny into research hospitals' tax-exempt status. These hospitals' standing may also needlessly suffer with Congress, for whom IRS tax forms are the primary source of standardized information on community benefit activities. Hospitals support transparency and welcome review of the *full* picture of their community benefit.

Instead, however, the IRS's recent revision to the instructions of a tax form has upended the regulatory landscape for nonprofit research hospitals, and could very well imperil the tax-exempt status of these hospitals. What follows below is a description of the agency's actions in this area over the course of nearly 50 years, vividly illustrating that even small, interpretive agency action can and does effect fundamental change.

AFTER DECADES OF CONSISTENT PRACTICE ON HOW NONPROFIT RESEARCH HOSPITALS CAN QUALIFY FOR OR CONFIRM TAX EXEMPTION, THE IRS RECENTLY AND RETROACTIVELY REVERSED ITS POLICY THROUGH AN INTERPRETIVE RULE.

Although nonprofit hospitals have long been exempt from income taxation, the Internal Revenue Code (the "IRC" or "Code") does not explicitly grant an exemption for hospitals. The Code does, however, provide exemptions to certain charitable

organizations. *See* IRC §§ 501(a), 501(c)(3). Since the inception of the federal income tax, nonprofit hospitals have qualified for this exemption. *See, e.g.*, Douglas M. Mancino, "The Charity Care Conundrum for Tax-Exempt Hospitals," Taxation of Exempts, July/August 2008. Whether a nonprofit hospital is charitable (and, in turn, tax-exempt) "is determined on a case-by-case basis by the IRS." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 29 (1976). Exactly how the IRS goes about this "case-by-case" process has evolved over time, and has long involved interpretive rules.

A. For Decades, IRS Revenue Rulings Have Governed Tax Exemption for Nonprofit Hospitals and Recognized the Relevance of All Medical Research, Regardless of Funding Source.

The IRS first tackled hospital tax exemption in 1956, with a revenue ruling. A revenue ruling is an "interpretive ruling[]" by the IRS that lacks "the force and effect of regulations." *Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995). Nonetheless, a revenue ruling stands as "*an official interpretation* by the [IRS] of the Internal Revenue Code, related statutes, tax treaties, and regulations," announcing "the conclusion of the Service on how the law is applied to a specific set of facts." Internal Revenue Manual 32.2.2.3.1 (Aug. 11, 2004) (emphasis added); *see also* Treas. Reg. § 601.601(d)(2)(i)(a). In this 1956 revenue ruling, the IRS held that a hospital may be tax-exempt if it is operated "to the extent of its financial ability for those not able to pay for the services rendered," as opposed to being operated

"exclusively for those who are able and expected to pay." Rev. Rul. 56-185, 1956-1 C.B. 202.

In part due to difficulties applying this "financial ability" standard, however, the IRS revised its rule in 1969. *See, e.g.*, Robert Bromberg, Tax Planning for Hospitals, pp. 7-26 to 7-27 (1977). Through a new revenue ruling that remains in effect today, the agency announced what came to be known as the "community benefit" standard for hospital tax exemption. *See* Rev. Rul. 69-545, 1969-2 C.B. 117. The agency explained that "the promotion of health is considered to be a charitable purpose," and that a hospital qualifies as "charitable" when its "promotion of health" provides "benefit to the community." *Id.* Although this standard ultimately turns on the totality of the circumstances, the IRS specifically treated medical research as a community benefit, noting that a hospital "operate[s] in furtherance of its exempt purposes" when it "advance[s] its medical training, education and research programs." *Id.*[10]

In 1983, the IRS returned to the issue, and reiterated that hospitals could meet the community benefit standard through medical research and education. Rev. Rul. 83-157, 1983-2 C.B. 94.

These two revenue rulings, from 1969 and 1983, remained the leading authorities on the community benefit standard for over two more decades. Indeed,

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[10] In the years before the IRS confirmed that hospitals that benefit the community as a whole qualify as charitable entities, the Virginia Supreme Court reached a similar conclusion. *See City of Richmond v. Richmond Mem'l Hosp.*, 116 S.E.2d 79, 84 (Va. 1960) ("Non-profit hospitals which are devoted to the care of the sick, which aid in maintaining public health, and contribute to the advancement of medical science, are and should be regarded as charities.").

in 1992, the IRS issued guidelines emphasizing that agents applying the community benefit standard should consider all of the factors cited in the two rulings, which included the use of funds on medical research. Announcement 92-83, 1992-22 I.R.B. 59. At no point in this long history did the IRS ever suggest that it mattered *how* a hospital funded its medical research—i.e., whether through restricted grants or other means.

B. In 2008, After Seeking Public Comments on the Community Benefit Standard, the IRS Reconfirmed the Relevance of All Medical Research Regardless of Funding Source.

In 2006, the IRS began to revisit the community benefit standard. Responding to concerns that the standard was too flexible and open-ended—with, for example, no binding rules on how to measure or report community benefit activities—the IRS launched a study of nonprofit hospitals in an attempt to better understand how hospitals were meeting the standard.

As part of this "Hospital Compliance Project," the agency sent questionnaires to hundreds of hospitals asking about their community benefit activities and expenditures. That questionnaire asked nine questions about hospitals' medical research, including whether the research was funded through public or private sources. *See* IRS Exempt Organizations (TE/GE), Hospital Compliance Project, Final Report, Appendix B, *available at* http://www.irs.gov/pub/irs-tege/frepthospproj.pdf. The agency did *not* ask whether the funding was limited to specific projects (i.e., through restricted grants). *See id.*

While the Hospital Compliance Project was underway, the IRS embarked on a redesign of Form 990, the form that tax-exempt organizations must file annually. The draft redesign required nonprofit organizations to submit schedules specific to the organization's type and activities. IRS, Tax-Exempt and Government Entities Division, Exempt Organizations, Background Paper: Redesigned Draft Form 990, June 14, 2007 ("Background Paper"). One of these draft schedules, Schedule H, was exclusively for nonprofit hospitals and required them to quantify and report their community benefit expenditures.

The IRS's draft of Schedule H asked hospitals to itemize their charity care, medical research, education, and other types of community benefit expenditures. The draft schedule also included extensive instructions on how to complete the form, and called for hospitals to compute their community benefit expenditures as a percentage of their total expenses. These instructions effectively functioned as a new rule delineating the IRS's position on which activities satisfied the community benefit standard (and thus supported tax-exempt status).

The IRS recognized the importance of these (and its other) changes to Form 990. Unlike most other tax forms, Form 990 must be made publicly available, both by the IRS and the nonprofit organization. *See* IRC § 6104(b).[11] The form therefore gives the public insight into how a nonprofit organization pursues its mission and complies with tax laws. Acknowledging, then, that a redesigned Form 990 not only could add

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[11] In addition, the nonprofit organization GuideStar USA, Inc. compiles these forms and makes them available online. *See* GuideStar Home Page, http://www.guidestar.org.

significant administrative burdens and be highly consequential to nonprofit organizations' tax status, but also could impact these organizations' public stature, the IRS solicited public comments on a draft of the new form. *See* Press Release, IRS Releases Discussion Draft of Redesigned Form 990 for Tax-Exempt Organizations, IR 2007-117 (June 14, 2007).

The IRS took particular interest in "the reporting of community benefit by hospitals in Schedule H," seeking input on this specific issue as part of its more general request for comments. Background Paper, *supra*, at 5. The public shared the agency's interest, both in Form 990 and in Schedule H in particular. The IRS received approximately 700 public comments on the draft form,[12] and more comments on Schedule H than on any other part of the draft. *See* Christopher Quay, Changes, New Schedule to Draft Redesign Form 990 Coming, Official Says, Tax Notes Today, November 19, 2007. IRS officials said publicly that many hospitals expressed concern with how the draft form solicited information on community benefits.

After considering the many comments as well as information from the ongoing Hospital Compliance Project, the IRS issued draft instructions for Schedule H in April 2008. These draft instructions included 10 pages and 8 worksheets explaining which expenditures counted as promoting the community's health and thus as a "community benefit." Of

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[12] Internal Revenue Service, Overview of Form 990 Redesign For Tax Year 2008 (Dec. 20, 2007), *available at* http://www.irs.gov/pub/irs-tege/overview_form_990_redesign.pdf.

particular note, one of the worksheets focused on medical research activities.

This worksheet's instructions permitted hospitals to claim credit for "the cost of internally-funded research, as well as the cost of research funded by a tax-exempt or government entity"—without further regard to how the research was funded. Moreover, the IRS emphasized when issuing the draft instructions that unrestricted and restricted grants would be treated identically. *See* 2008 Schedule H (Form 990) Instructions – Draft, April 7, 2008 ("The Part I Table and Worksheets do not require that grants restricted for community benefit activities be deducted from the grantee organization's gross community benefit expenses in determining its net community benefit expenses."). As with the draft of Schedule H, the IRS solicited public comments for the draft instructions as well.

When the final instructions were issued in August 2008, the IRS reiterated even more explicitly that expenses for research funded by restricted grants count fully as community benefit expenditures. In highlighting changes from the draft instructions, the IRS explained that the final version "[c]larifies the organization may include . . . the cost of research that is funded by a tax-exempt or governmental entity . . . ." Background Paper, Changes to April Draft Instructions at 6, August 19, 2008. In addition, the final instructions to Schedule H unambiguously state that hospitals need not deduct (through "direct offsetting revenue") any "restricted or unrestricted grants or contributions that the organizations uses to provide a community benefit."

In 2009, after Schedule H had been finalized, the Hospital Compliance Project issued its final report. *See* Hospital Compliance Project, Final Report, *supra*. The report discusses medical research expenditures at length, and never suggests that such expenditures could be anything other than community benefit expenditures. The report does not even mention the question of whether research is funded by restricted or unrestricted grants.

That was not surprising. Under the instructions to Schedule H, as well as decades of prior practice, medical research funded by restricted grants counted as activity that promoted a community benefit. What would have been surprising was a suggestion to the contrary.

C. In December 2013, the IRS Changed Its Rule on Medical Research Expenditures Retroactively, Without Notice, Explanation, or Relief for Past Reliance.

At the end of 2013, with no warning and no explanation, the IRS reversed its longstanding position on restricted grants. On December 9, 2013, the IRS released a draft of Form 990 (including Schedule H) and the accompanying instructions for the 2013 tax year. Suddenly, without precedent, restricted research grants were to be treated differently by no longer being counted toward community benefit.

The draft instructions discarded the rule that had been reconfirmed after the prior notice-and-comment process, under which "direct offsetting revenue" did *not* include any "restricted or unrestricted grants or contributions that the organizations uses to provide a community benefit." Now, the instructions stated

that "direct offsetting revenue" *did* include "restricted grants or contributions that the organization uses to provide a community benefit, such as a restricted grant to provide financial assistance or fund research." In other words, hospitals could no longer claim credit for restricted grants.[13] Coming in December of the tax year at issue, this change was proposed too late for nonprofit hospitals to adjust their research and other activities so as to maintain their prior levels of community benefit expenditures.

Nor did hospitals have any meaningful opportunity to raise their concerns with the IRS. Although the IRS permitted comments on the draft form (as the IRS does with all draft forms), the agency gave no deadline for comments. And just *eleven* days after releasing the draft form, on December 20, 2013, the IRS issued a final form and instructions adopting the change, and discarding decades of precedent on the treatment of research grants. The IRS did not explain the change in the instructions or any accompanying statement, nor did the agency even highlight the change in the "What's New" section of the instructions.

Notwithstanding the IRS's apparent efforts to avoid attention, affected parties quickly noticed the change. On December 26, 2013, just 17 days after the draft was issued, the AHA, HFMA, and AAMC submitted comments expressing great concern about the draft form—not only regarding the change on restricted grants, but also on another, unrelated

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[13] Hospitals are still able to claim credit for "unrestricted grants or contributions that the organization uses to provide a community benefit." IRS, Instructions for Schedule H (Form 990) at 3.

change. In response, the IRS promptly revised the latter change, issuing a corrected version of the instructions on January 15, 2014. The agency, however, did not even respond to the comments on the change regarding restricted grants.

As a result, for the 2013 tax year, restricted grants—for the first time in the history of the community benefit standard—will be treated differently from unrestricted grants. Buried in the revised instructions to a form, this reversal of the IRS's position was not the subject of a revenue ruling, notice-and-comment rulemaking, or any other of the more formal procedures regularly used by the IRS.

The IRS's use of an interpretive rule is a far cry from the picture Petitioners paint of such rules and their function. *See, e.g.*, Fed. Petitioners' Br. at 21 (stating that interpretive rules exist "*simply to inform* the public about the agency's own views on the meaning of relevant statutory and regulatory provisions" (emphasis added)); Private Petitioners' Br. at 51 ("[I]nterpretive rules *merely reflect* the agency's present belief concerning the meaning of the statutes and regulations administered by the agency" (emphasis added) (internal quotation marks and brackets omitted)). The IRS employs interpretive rules (which include changes to tax form instructions) to directly regulate taxpayers, including nonprofit hospitals. And when the IRS revises these rules, it is thus doing much more than "simply explaining" that it "has corrected or revised its previous legal interpretation of a regulation in some significant way," to ensure the public is not "misled" while the agency abides by a different understanding. Fed.

Petitioners' Br. at 14. The IRS is, instead, changing how tax law *operates*.[14]

Moreover, when the IRS revises an interpretive rule, it is rare that "no one has ever relied on the prior interpretation." *Id.* Nevertheless, the IRS has not hesitated to disregard such reliance and to retroactively erase a decades-old position with just days of notice, without any explanation or prior announcement. These changes affect the regulated parties directly and significantly—as, unfortunately, many nonprofit hospitals have experienced first-hand.

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[14] Indeed, a hospital that disregards the IRS's view when reporting its community benefit would face the risk of penalties. *See* IRC § 6652(c)(1).

CONCLUSION

The judgment of the U.S. Court of Appeals for the D.C. Circuit should be affirmed.

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October 16, 2014

AMICUS CURIAE BRIEF

Nos. 13-1041, 13-1052

In the

Supreme Court of the United States

THOMAS E. PEREZ,
SECRETARY OF LABOR, ET AL., PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION, RESPONDENT.

JEROME NICKOLS, ET AL., PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The APA's Framers Recognized That "Interpretative" and "Legislative" Rules Must Be Distinguished by Their Function, Not Their Form 6

II. This Court and Scholars Have Recognized That Interests "Engendered" by an Initial Interpretative Rule Justify Heightened Scrutiny of Subsequent Re-Interpretations 15

III. The APA's Framers Obligated Courts To Police the Boundary Between "Legislative" and "Interpretative" Rules 20

IV. The APA's Framers Relaxed Notice-and-Comment Requirements for Interpretative Rules Because They Expected the Courts To Conduct Robust, "Plenary" Judicial Review of Those Rules 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Prof. Hunters Ass'n v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) 8, 20, 29

Am. Mining Cong. v. *MSHA*, 995 F.2d 1106 (D.C. Cir. 1993)..... 5, 8, 15, 23, 29

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)..... 19, 26, 27, 28

Christopher v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012)..... 26

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009)..... 18

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)..... 1

Guardian Fed. Sav. & Loan Ass'n v. *Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658 (D.C. Cir. 1978)..... 5

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007)..... 5

Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).... 6, 8, 15, 20, 29

Shaughnessey v. *Pedreiro*, 349 U.S. 48 (1955)..... 12

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996)..... 18

Talk America, Inc. v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254 (2011)..... 26, 27

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TABLE OF AUTHORITIES—CONT'D

Page(s)

STATUTES

5 U.S.C. § 553 18

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TABLE OF AUTHORITIES—CONT'D

Page(s)

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Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398 (1941) 16

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H.R. Rep. No. 79-1980 (1946) 21

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TABLE OF AUTHORITIES—CONT'D

Page(s)

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Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1985) 26

S. 7, 79th Cong. 1st Sess. (1945) 12

S. Rep. No. 79-752 (1945) 21

Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945) 24

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TABLE OF AUTHORITIES—CONT'D

Page(s)

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

The Competitive Enterprise Institute (CEI) is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has participated in cases before this Court and lower federal courts involving major constitutional and statutory issues. *See, e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice in America through defending the Constitution as

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[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP educates through various outlets, including print, broadcast, and Internet media.

The Cato Institute, CEI, and JEP are interested in the courts' enforcement of the Administrative Procedure Act's procedural protections, which Congress enacted to ensure that regulatory agencies would respect the rule of law, limited government, and the public's right to participate meaningfully in the promulgation of substantive regulations.

SUMMARY OF ARGUMENT

Under *Vermont Yankee*, courts must not burden agencies with procedural requirements above and beyond those already imposed by the Administrative Procedure Act (APA). *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 545-49 (1978). But to honor this rule, the courts must first ascertain which APA requirements apply at all. *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006).

In this case, the courts must determine whether the challenged Labor Department action is an "interpretative rule" or a "legislative rule." The Government does not answer this question—it begs it, simply asserting that the rule is interpretative. Gov't Br. 6-7. Thus, it argues, the D.C. Circuit's decision requiring notice-and-comment proceedings for the rule violates *Vermont Yankee*. *Id.* at 14-15.

The Government's argument is rooted in an oversimplified characterization of the APA's history, purpose, and text. *Amici* submit this brief to provide the Court with a more complete account of the APA, rebutting four sweeping generalizations proffered by the Government:

First, the Government asserts that the APA draws an "unambiguous" line between legislative and interpretative rules. But in fact, the APA's framers recognized that the boundary between "interpretative" and "legislative" rules is blurred, and must be governed in light of a rule's function, not merely its form.

Second, the Government asserts that there must be no distinction drawn between an agency's initial

interpretation and its subsequent re-interpretations. But as this Court and scholars have recognized, interests engendered by an agency's initial interpretation are relevant to the agency's subsequent "re-interpretations."

Third, the Government criticizes the D.C. Circuit for independently analyzing whether the agency's rule is "interpretative" or "legislative." But the APA's framers stressed that it must be the duty of courts—not agencies—to police the boundary between legislative and interpretative rulemaking.

Finally, the Government self-servingly asserts that Congress enacted this notice-and-comment exemption for the sole purpose of alleviating burdens on agencies. But in fact, Congress enacted that exemption because it expected interpretative rules to face more thorough judicial review than legislative rules would face. Today, however, interpretative rules receive utmost deference from the courts, which makes rigorous enforcement of notice-and-comment requirements all the more indispensable.

Ultimately, the Government paints the APA as a tool of regulator convenience. But the APA's sponsor saw it quite differently: "Except in a few respects," Sen. McCarran explained, "this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations." *See infra* at 22. The APA was enacted to restrain agencies, not empower them. To that end, the courts must not allow the "interpretative rule" exception to swallow the notice-and-comment rule. The D.C. Circuit rightly asked not what the agency's rule did in form, but what it did in effect.

ARGUMENT

The APA draws a basic distinction between "legislative" rules and "interpretative" rules, but it does not define either of those terms. *Guardian Fed. Sav. & Loan Ass'n* v. *Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978) (Leventhal, J.).[2] The "essential meaning" of that distinction—that legislative rules are promulgated with "the force of law" but interpretative rules are not—may be simple to state in theory, *id.*, but it proves difficult to apply in practice. Courts "have characterized the distinction as 'fuzzy,' 'tenuous,' 'blurred,' 'baffling,' and 'enshrouded in considerable smog.'" Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.4, p. 448 (5th ed. 2010) (quoting cases). Scholars are no less blunt: "Distinguishing between 'interpretation' and 'lawmaking' can have the qualities of a shell game." Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1478 n.44 (1992).

These lines become even more difficult to draw when what the agency "interprets" are not statutes passed by Congress, but "legislative" rules promulgated and previously interpreted by the very same agency now purporting to "re-interpret" them. *See, e.g.*, *Am. Mining Cong.* v. *MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (recognizing that a nominal

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[2] While the APA speaks of "interpretative" rules, over time they have come to be called "interpretive" rules. *See Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007). Because this brief focuses on the original framing of the APA, it employs the original term, "interpretative."

"interpretation" could be "a de facto amendment of prior legislative rules").

The federal courts have grappled with this by inquiring into rules' actual function instead of their mere form, devising rough criteria to separate "interpretative" from "legislative" rules. The D.C. Circuit offered one such approach in *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997); *see also* Pierce, 1 *Administrative Law Treatise* § 6.4, pp. 454-66 (describing various approaches). By the *Paralyzed Veterans* test, the court attempts to determine whether "the interpretation itself carries 'the force and effect of law,'" thus making it a legislative rule. 117 F.3d at 588.

Decades of experience have illuminated the challenge of distinguishing between "interpretative" and "legislative" rules, but the APA's framers and that era's scholars saw the challenge, too. They recognized that "interpretative" and "legislative" rules must be distinguished by their function, not mere form—and that the obligation to do so would fall upon the courts.

I. The APA's Framers Recognized That "Interpretative" and "Legislative" Rules Must Be Distinguished by Their Function, Not Their Form

1. The Government asserts that the Labor Department's rule is an "interpretive rule," but it never explains why this is so. Gov't Br. 6-7; *see also* Resp. Br. 13-14 ("Petitioners simply assert that AI 2010-1 is an 'interpretive rule' exempt from APA

notice and comment: Q.E.D."). Nor has Respondent conceded that the rule is an interpretative rule.[3]

The mere presence of an "interpretation" in the rule does not make it an "interpretative rule," because many "legislative" rules contain interpretations. *See* Pierce, 1 *Administrative Law Treatise* § 6.4, pp. 433-34; Arthur E. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 Admin. L. Rev. 101, 109 (1971) ("It should be noted . . . that a legislative rule may sometimes interpret other law.").

The Government notes that "interpretive" rules "do not have the force of law," Gov't Br. 19, but it makes no effort to explain why the Labor Department action at issue lacks such "force." While the Government now asserts that the department's decision is nonbinding, in the lower courts the Government took a much less humble view, arguing that the courts must treat the department's interpretation as "controlling."[4] Moreover, the department's rule categorically concludes, "[b]ased upon a thorough analysis of the relevant factors," that "mortgage loan officers who perform the typical

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[3] The Government inaccurately claims that Respondent "acknowledged" that the rule was an "interpretative rule." Gov't Br. 6-7. In fact, Respondent acknowledged only that the rule contained an "interpretation." *See* Resp. Br. 46 n.8.

[4] Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mortgage Bankers Ass'n* v. *Solis*, No. 11-73, Doc. 20, at 9 (D.D.C. May 17, 2011).

duties" described in the decision "*do not qualify* as bona fide employees exempt under" the Fair Labor Standards Act. Pet. App. 69a. (emphasis added). The Government does not explain how this "controlling" decision lacks the "force of law."

By contrast, the D.C. Circuit's approach in the decision below focuses on function over form. It asks whether the government action, whatever its form or purported intent, "has *in effect* amended its rule, something it may not accomplish under the APA without notice and comment." Pet. App. 2a (quoting *Alaska Prof. Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)) (brackets omitted, emphasis added). Thus, an agency's "stated intent to treat a major substantive legal addition as an 'interpretative' rule will not by itself suffice to escape the notice and comment requirements of section 553" of the APA. *Paralyzed Veterans*, 117 F.3d at 588 (citing *Am. Mining Cong.*, 995 F.2d at 1109-10). Rather, the court determined whether the agency rule "carries 'the force and effect of law,'" by applying the *Paralyzed Veterans* test. *Id.*

2. The court's realistic approach would not have been foreign to the APA's framers. Rather, the debates in Congress and that era's scholarship recognized that to determine whether a given rule truly is "interpretative" or "legislative" requires judgment. And the APA's framers expected the courts to exercise such judgment based not on a rule's nominal form or the agency's subjective intent, but on the rule's actual, substantive function as to regulated entities. While the Government asserts that the APA's "interpretative rule" exemption is "unambiguous," Gov't Cert. Pet. 9, the APA's framers

saw considerable ambiguity in the legislative-interpretative distinction, and they enacted a statute that accommodates the courts' practical judgment.

Indeed, this ambiguity was recognized and analyzed in the debates giving rise to the APA. In its 1941 report, the Attorney General's Committee on Administrative Procedure stressed that the theoretical distinction between legislative and interpretative rules—namely, whether they have "statutory force upon going into effect"—is often "blurred" by the fact that even nominally "interpretative" regulations can have great practical impact. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 77-8, 1st Sess. (1941), at 100. But the Government ignores these warnings, even while citing other parts of the Committee's report.[5]

The Committee's appreciation of the difficulty in distinguishing legislative and interpretative rules reflected the state of scholarship in the years leading up to the APA's enactment. In an early book on American administrative law, John Preston Comer outlined the familiar theoretical distinction between legislative (or, in his words, "administrative") rules and interpretative rules, but then proceeded to explain why "it is almost impossible to separate the

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[5] The Government quotes the Committee's initial comment that interpretative rules "indicat[e] merely the agency's present belief concerning the meaning of applicable statutory language," *id.* at 27, but ignores the Committee's recognition that the theoretical line between interpretative and legislative rules is in fact "blurred." *See* Gov't Br. 21, Gov't Cert. Pet. 13.

two classes of regulations." John Preston Comer, *Legislative Functions of National Administrative Authorities* 29 & 137-38 (1927). And Comer cited various examples of regulators and congressmen recognizing the difficulty of separating interpretative rules from legislative ones. *Id.* at 141-44.

Yale's Abraham Feller, too, urged that a "word of caution is needed on the question of legislative versus interpretative regulations." A.H. Feller, *Addendum to the Regulations Problem*, 54 Harv. L. Rev. 1311, 1320 (1941). While there "can be no doubt of the validity of the basic distinction" between interpretative and legislative rules "in *principle*," this "distinction becomes blurred and may be difficult to administer" in *practice*: "What looks like an interpretative regulation may on close inspection be seen to be legislative, and vice versa." *Id.* at 1320-21 (footnote omitted, emphasis added).

3. Congress heeded these scholarly warnings. The APA does not expressly, specifically define "interpretative" or "legislative" rules. The legislative history reflects Congress's nuanced approach.

At the House Judiciary Committee's hearing, committee chairman Hatton Sumners pressed Carl McFarland, chairman of the American Bar Association (ABA) Committee on Administrative Procedure, on the practical distinction between interpretative and legislative (or "substantive") rules. McFarland's opinion was significant: as the Government notes, he was "a central figure in the APA's development," having served on the committee that produced the Attorney General's 1941 report, and eventually was a drafter of the APA legislation. Gov't Br. 21-22 & n.6. And while McFarland urged

the committee not to impose notice-and-comment requirements on interpretative regulations or statements of policy, he conceded to the chairman that there was no bright line distinguishing "interpretative" rules from "substantive" ones:

> THE CHAIRMAN. Mr. McFarland, let me interrupt you. *The interpretative regulations of substantive regulations become very definitely substantive.*
>
> MR. MCFARLAND. The interpretative?
>
> THE CHAIRMAN. The interpretative regulations of substantive regulations, because the interpretation is what affects these people.
>
> MR. MCFARLAND. That is right.

Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. 30 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 76 (1946) (emphasis added) (hereinafter "APA LEGISLATIVE HISTORY").[6]

The legislative history contains other references to "interpretative" rules. Senator Pat McCarran,

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[6] The Government quotes this exchange to support its point that "interpretative" rules are exempt from notice-and-comment, but it omits the Chairman's recognition that "interpretative regulations of substantive regulations become very definitely substantive." Gov't Br. 21-22.

sponsor of the APA bill,[7] stated that interpretative rules are "merely adaptations of interpretations of statutes." APA LEGISLATIVE HISTORY at 313 (statement of Sen. McCarran) (Mar. 12, 1946). That was the interpretation suggested in the Senate Judiciary Committee's print of S. 7, a forerunner to the APA. *See* S. 7, 79th Cong. 1st Sess. 6 (1945), *in* APA LEGISLATIVE HISTORY at 18 (contrasting "interpretative" rules with "substantive rules," and noting that "interpretative rules" were "merely interpretations of statutory provisions").

Such comments, in turn, were the basis for the "working definition" offered by the Attorney General's 1947 manual on the APA, to distinguish "interpretative" and "substantive rules." The manual repeated the theoretical distinction: a "substantive rule" has "the force and effect of law," while an "interpretative rule" is intended to "advise the public of the agency's construction of the statutes and rules which it administers." *See* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947). But it offered no explanation of how to discern whether a particular rule does, in fact, have "the force and effect of law."

Two years after the APA's enactment, Kenneth Culp Davis wrote that while the distinction between "legislative" and "interpretative" rules may prove difficult to apply in practice, the statute was intended to reflect the theory. *See* Kenneth Culp

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[7] *Shaughnessey* v. *Pedreiro*, 349 U.S. 48, 52 (1955) (noting that Senator McCarran was the APA's sponsor in the Senate).

Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 928-29. (1948). The APA's procedural exemption for "interpretative rules" was intended to reflect the fundamental force-of-law concept: "The meaning of the [APA's] term must be found in case law, in practices of agencies, and in usage," *id.* at 928, which maintained that legislative rules have "the same force and effect as valid statutes," while interpretative rules are those that "merely interpret previous law" but have no independent force of their own, *id.* at 929. Davis reiterated this interpretation of the APA's statutory meaning in his first book on administrative law. *See* Kenneth Culp Davis, *Administrative Law* 194-95 (1951). Davis was, to be sure, a critic of the notion that bright lines separate "legislative rules" from "interpretative rules" in practice, *see id.* at 198-200, but he acknowledged the APA's intended distinction between rules that "create new law" and those that do not, *id.* at 194.

Others shared Davis's view that the APA's exemption for "interpretative rules" embodied the basic notion of "force of law," but that the statute offered little direct guidance as to how to apply that theory in specific cases. At a 1947 symposium convened by Arthur T. Vanderbilt (a veteran of the Attorney General's 1941 committee) to analyze the newly enacted APA, Assistant Solicitor General David Reich presented a paper on "Rule Making Under the Administrative Procedure Act." Pressed by a questioner to "give us a little clarification as to what interpretative rule means in [Section 4 of the APA]," Reich conceded the fundamental difficulty of distinguishing between the two general categories of rules in any given case:

> The courts have looked differently at interpretative rules than at substantive rules. A substantive rule, as you know, has the full force and effect of law. But an interpretative rule does not have the effect of law. The Supreme Court often had difficulty in determining whether a particular rule is interpretative or substantive. In a broad sense, I think we can make the distinction I tried to make [*i.e.*, that legislative rules have the force of law but interpretative rules do not]. In a narrow situation, I am sure it is going to be more difficult, just like anything else.

David Reich, *Rule Making Under the Administrative Procedure Act*, in *The Federal Administrative Procedure Act and the Administrative Agencies: Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947*, at 492, 516 (George Warren ed., 1947).

In the decades that followed the APA's enactment, scholars have continued to criticize the notion that the APA draws a bright, easily administered line between "interpretative" and "legislative" rules.[8] And courts have approached such

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[8] *See, e.g.*, Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 Geo. L.J. 1047, 1052 (1976) (criticizing the distinctions drawn by the Attorney General's Manual as not "very meaningful"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 547 (2000) ("For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are

questions functionally, not formalistically. *See, e.g.*, *Paralyzed Veterans*, 117 F.3d at 586-88; *Am. Mining Cong.*, 995 F.2d at 1108-12; *see also* Pierce, *Distinguishing Legislative Rules From Interpretative Rules*, *supra* note 8, at 554-66.

In sum, the Government errs when it suggests that the APA draws an "unambiguous" line between interpretative and legislative rules. The APA established a framework in which courts must look to a rule's function, not its form, to determine whether it truly is an "interpretative rule," or whether instead it has the force of law.

II. This Court and Scholars Have Recognized That Interests "Engendered" by an Initial Interpretative Rule Justify Heightened Scrutiny of Subsequent Re-Interpretations

The Government asserts that there must be "symmetry" between the law's treatment of an agency's initial interpretation and its subsequent reinterpretations. Gov't Br. 31. But early scholars recognized that an initial interpretation can take on substantive force over time, particularly in light of

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appropriate to distinguish between legislative rules and interpretative rules"); *cf.* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 523-26, 540-42 (2002) (arguing that the APA implicitly adopted a convention that agencies cannot promulgate rules with the force of law unless "Congress attached sanctions in the statute to compel observance of the regulations," but that neither pre-APA nor post-APA cases mentioned the convention, due to lawyers failing to invoke it).

the interests engendered by that interpretation. And as modern scholars note, such considerations are heightened when the agency's inconsistent "interpretations" pertain not to a statute passed by Congress, but to a legislative rule promulgated by the same agency.

1. Erwin Griswold and Kenneth Culp Davis both rejected the notion that initial reinterpretations and subsequent reinterpretations are "symmetrical." Gov't Br. 31. Erwin Griswold distinguished in 1941 between an agency's initial interpretation of a statute and its subsequent reinterpretations. While "the practicalities of administration" call for agency "freedom in working out the proper construction of a statute in the early days after its enactment," the passage of time can reduce an agency's flexibility: "after a while, an interpretative regulation becomes seasoned. It becomes something upon which people justifiably rely." Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 413 (1941). This should preclude agencies from making "retroactive" changes to their interpretations, Griswold argued, *id.*, and it also raises "most difficult question[s]" about the agency's discretion in changing a "seasoned interpretation" prospectively, too, *id.* at 415-16. Subsequent interpretations "can hardly have much foundation in any actual understanding of the legislature at the time the statute was passed," he reasoned, and "the factors of certainty and predictability" weigh against allowing the law "to change by mere administrative fiat." *Id.*; *see also* Note, *Judicial Review of Reversals of Policy by Administrative Agencies*, 68 Harv. L. Rev. 1251, 1253 (1955) ("Newly formulated administrative policy which represents a change in the agency's

view is most vulnerable to attack when it disturbs those who have relied.").

Kenneth Culp Davis did not embrace Griswold's view wholeheartedly, but neither did he reject it altogether. In his 1951 book, Davis wrote that it would be "overstate[ment]" to suggest that "regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes," should *always* be "deemed to . . . have the effect of law." Davis, *Administrative Law* 205. Instead, Davis proposed a slightly more nuanced approach, in the context of reinterpretations with retroactive effect: "long-followed regulations or practices are often given extra authoritative weight but do not *necessarily* have the effect of law." *Id.* (emphasis added).

Davis was more direct a few years later, in the first edition of his treatise. Distinguishing legislative from interpretative rules, he explained that "[a]n interpretative rule may or may not have the force of law, depending upon such factors as . . . *whether the rule is one of long standing*." Kenneth Culp Davis, 1 *Administrative Law Treatise* § 5.03, p. 300 (1st ed. 1958) (emphasis added).[9]

2. The Government's call for "symmetry" also lacks support in the modern caselaw that it cites. The Government quotes repeatedly this Court's

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[9] *Cf. id.* at § 5.06, p. 330 ("the Court has sometimes given greater weight to contemporaneous and long-standing construction, where the question is scope of power to issue legislative rules").

statement that the APA's judicial-review provision "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), *quoted in* Gov't Br. 12, 17, 30. But the Government neglects to quote *Fox*'s crucial caveat that this general rule is subject to significant exceptions—most importantly, that courts must scrutinize an agency's revision of a prior rulemaking more closely when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered *serious reliance interests* that must be taken into account." *Id.* (emphasis added) (citing *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).[10]

By specifically acknowledging that agency revisions of prior policies may implicate substantial "reliance interests," and that courts may need to take action to prevent undue injury to such interests, the Court was acknowledging the substantial due process and rule-of-law concerns that Griswold and Davis had voiced.

3. Such concerns are heightened when what the agency is interpreting and re-interpreting are not

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[10] The Government's use of *Fox* also suffers from a second flaw: each time the Government quotes *Fox* for the proposition that the APA "makes no distinction" between initial and subsequent agency action, it neglects to acknowledge that the Court limited this characterization to the APA's judicial review provision, 5 U.S.C. § 706, and not to 5 U.S.C. § 553's rulemaking procedures or the APA as a whole. *See id.*

Congress's statutes but the agency's own regulations. And they are exacerbated still further when the agency benefits from extensive judicial deference—the combination gives agencies an incentive to promulgate ambiguous regulations initially, and then "interpret" them with the protection of extreme judicial deference.

As Prof. John Manning explains, "[i]f *Seminole Rock* permits agencies to adopt imprecise or indeterminate regulations, and to bind the courts and public to improbable or hard-to-predict constructions of its regulations, then the notice-giving function is disserved." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 669 (1996) (footnote omitted) (discussing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). And, Prof. Manning continues, if an agency faces only *de minimis* procedural restraints in interpreting and re-interpreting the regulations that the agency itself prescribed, then "regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation has been *definitively interpreted* by the agency." *Id.* at 671 (emphasis added) (citing Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 20 (1962) ("A second reason for definite standards of administrative adjudication is the social value in encouraging the security of transactions.")).

Building on Manning's analysis, Matthew Stephenson and Miri Pogoriler note that one benefit of reducing judicial deference to subsequent agency re-interpretations would be to "mitigate an agency's

incentive to leave key issues permanently undecided," and thus would promote "the further desirable effect of making agency rules, and their application, more predictable." Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1478 (2011).

The interests identified by Griswold and Davis at the time of the APA's enactment, and by Manning and others in more recent debates, are similar to the interests that animated the D.C. Circuit's analysis in *Paralyzed Veterans* and *Alaska Hunters*. If an agency can cloak effective rule amendments in the form of "interpretation," then the public cannot "know the rules by which the game will be played." *Alaska Hunters*, 177 F.3d at 1035 (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. Q. Rev. 412, 414 (1909)). The Government's categorical assertion that there must be "symmetry" in the courts' treatment of initial interpretative rules and subsequent re-interpretations simply shrugs off these fundamental, long-recognized concerns.

III. The APA's Framers Obligated Courts To Police the Boundary Between "Legislative" and "Interpretative" Rules

The Government criticizes the D.C. Circuit for inquiring into whether the agency action was merely "interpretative" (as the Government asserts), or whether it was in fact legislative and thus not within the APA's exemption from notice-and-comment. *See, e.g.*, Gov't Br. 34-35. By attacking as *ultra vires* the D.C. Circuit's unremarkable exercise of the judicial authority to decide whether the Labor Department's action was in fact "interpretative," the Government

contradicts another point that the APA's framers and founding-era scholars emphasized: that courts must police the boundary between "interpretative" and "legislative" rules, in order to prevent agencies from evading the requirements that the APA's framers placed upon them.

1. Throughout the debates giving rise to the APA, Congress stressed that the Act was intended to restrain agencies, and that responsibility for ensuring compliance with the APA's restraints would fall not to the agencies themselves, but to the courts:

> These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, *is a function which is clearly conferred upon the courts in the final analysis.*[11]

Accordingly, "[i]t will thus be the *duty* of reviewing courts *to prevent avoidance of the requirements of the bill by any manner or form of indirection*, and to determine the meaning of the words and phrases used." APA LEGISLATIVE HISTORY 217 (Senate Report) (emphasis added); *id.* at 277-78 (House Report); *see also id.* at 326 (statement of Sen. McCarran) (similar).

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[11] This instruction appeared in identical form, in both the Senate and House Reports. S. Rep. No. 79-752 (1945), *reprinted in* APA LEGISLATIVE HISTORY 217; H.R. Rep. No. 79-1980 (1946), *reprinted in* APA LEGISLATIVE HISTORY 278 (emphasis added).

Thus, with respect to the APA's distinction between interpretative and legislative rules, "the problem of categorizing administrative rules" is "deposited squarely into the laps of the courts[.]" Paul R. Dean, *Rule Making: Some Definitions Under the Federal Administrative Procedure Act*, 35 Geo. L.J. 491, 497 (1947).

Congress entrusted this duty to the courts, not the agencies, because the APA was intended to restrain the agencies, not empower them. "Except in a few respects," Senator McCarran explained, "this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations." APA LEGISLATIVE HISTORY 326 (Statement of Sen. McCarran); *see id.* at 298 (describing the APA as "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government").

Thus, as Prof. Pierce observes, when the agency says "that it is issuing only an interpretative rule," it "is not appropriate for a court simply to accept the agency's characterization":

> In such a situation, the agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure. Thus, a court must attempt to determine whether a putative interpretative rule is actually a procedurally invalid legislative rule by determining whether the rule, if valid, actually has "the force of law."

Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, *supra* note 8, at 555 (citing *Am. Mining*, 995 F.2d at 1112); *see also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 390 ("a court cannot always rely on labels to distinguish between legislative and nonlegislative rules," because an agency "may try to disguise the issue by failing to describe its product clearly.").

Thus, when the Government criticizes the D.C. Circuit for simply attempting to carry out its obligations under the APA, the Government flips the APA on its head. The court did not "disregard the limits on judicial intervention contained in Section 4 of the APA[.]" Gov't Br. 28. To the contrary, the court fulfilled the obligation placed upon it by the APA: to determine whether the Labor Department's rule truly is a mere interpretative rule, lest the department promulgate a legislative rule without the requisite notice-and-comment proceedings.

IV. The APA's Framers Relaxed Notice-and-Comment Requirements for Interpretative Rules Because They Expected the Courts To Conduct Robust, "Plenary" Judicial Review of Those Rules

Throughout its brief, the Government asserts that the APA exempts interpretative rules from notice-and-comment for one and only one reason—to make it easier for agencies to promulgate such rules:

> The reason for exempting interpretive rules from notice-and-comment rulemaking is plain . . . Congress presumably determined that it would be an unwarranted encroach-

> ment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.

Gov't Br. 20-21. But this rationalization, and the clips of legislative history selectively quoted by the Government in support of it, tells only half the story.

Bureaucratic efficiency was indeed *one* of Congress's reasons for exempting interpretative rules from notice-and-comment procedures. But there was *another* reason, which the Government neglects to mention: the APA's framers expected the courts to conduct robust, "plenary" judicial review of "interpretative rules." Such judicial review would provide an *ex post* restraint on agencies sufficient to offset the absence of *ex ante* procedural protections. *See, e.g.*, Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *excerpted in* APA LEGISLATIVE HISTORY 18.[12]

This point was stressed in the Senate by the APA's sponsor. "The pending bill exempts from its procedural requirements all interpretative . . . rules," Sen. McCarran explained, "because under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review [than legislative

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[12] Legislative rules, by contrast, would receive relaxed judicial review, and therefore justified the additional *ex ante* procedural protections. *Id.*

rules are]." APA LEGISLATIVE HISTORY 313 (statement of Sen. McCarran).

The Attorney General's 1941 committee report also alluded to this consideration. *Final Report of the Attorney General's Committee on Administrative Procedure* at 27. Perhaps the committee did so at the behest of member Ralph Fuchs, who had raised this point in a recent article. "If the regulation is subject to challenge in all of its respects after its promulgation," he wrote in 1938, "the need for advance formalities is reduced or eliminated"; but when regulated parties are left "with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it." Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 271, 272 (1938).[13]

This is not to say that the APA's framers harbored the illusion that courts would accord *no* weight to any agency's interpretations. As Prof.

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[13] Perhaps its mention owed also to the committee's director, Walter Gellhorn. In a book published the same year as the committee's report, Gellhorn wrote:

> Both the court and the administrative agency are vital instruments of democratic policies and defenders of democratic gains. Each has special values to contribute. In some areas one may conclude, purely pragmatically, that the organization and procedure of the one are better adapted than those of the other to furthering the nation's aspirations.

Walter Gellhorn, *Federal Administrative Proceedings* 73 (1941).

Davis noted in 1951, "although courts are free to substitute their judgment as to content of interpretative rules they often refrain in varying degrees from doing so." Davis, *Administrative Law* at 201.[14] Nevertheless, the APA's framers intended for courts to enjoy the authority to review agency interpretations *de novo*, and they saw the availability of this *ex post* protection as the necessary corollary to the APA's elimination of notice-and-comment protections *ex ante*.

2. Seven decades later, however, judicial review of agencies' interpretative rules is much less exacting. By extending *Seminole Rock* deference to agencies' interpretative rules, the courts have brought about precisely the situation that the APA's framers sought to avoid: agency rules promulgated without notice and comment, yet facing no meaningful judicial scrutiny, and thus "creat[ing] a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (brackets omitted) (quoting *Talk America, Inc.*

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[14] *See also* Davis, 1 *Administrative Law Treatise* § 5.03, p. 298 ("The distinction [between interpretative and legislative rules] is important because courts often substitute judgment as to the content of an interpretative rule but almost always (theoretically always) as to the content of a legislative rule."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (noting that the promise of plenary judicial review "was not *categorically* true in 1945" (emphasis added)).

v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

The present case exemplifies the cause for such concerns. The Government maintains that the Labor Department's action is exempt from notice-and-comment requirements because the rule is not "binding" with the "force of law." Gov't Br. 21. Yet the Government has argued in the same case that the department's action must be given "controlling deference" by the courts. Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mortgage Bankers Ass'n* v. *Solis*, No. 11-73, Doc. 15, at 26 n.17 (D.D.C. Mar. 10, 2011).

As it happens, Prof. Davis anticipated in 1951 the dangers of mixing the APA's notice-and-comment exemption with judicial deference. Citing the "recent case" of *Seminole Rock*, Davis noted that to extend such deference to interpretative rules would produce "absurd" results: "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." Davis, *Administrative Law* 202 n.72. Recognizing that he was writing at a moment when "the science of interpretation of administrative rules . . . is still in its infancy," Davis noted his expectation that the Supreme Court would intervene and prevent agencies from receiving *Seminole Rock* deference for such rules. *Id.* But history proved otherwise. *See* Manning, 96 Colum. L. Rev. at 654-96; Stephenson & Pogoriler, 79 Geo. Wash. L. Rev. at 1459-66.

While the propriety of extending *Seminole Rock* deference to interpretative rules is not an issue

before the Court in this case, these considerations cast substantial doubt upon the Government's claim that subjecting the Labor Department's rule to notice and comment unfairly restricts the agency's "free[dom] to fashion [its] own rules of procedure." Gov't Br. 27 (quoting *Vermont Yankee*, 435 U.S. at 544-45). Such complaints ignore the costs borne by the public when, contrary to the APA's framers' intentions, rules are subjected to neither *ex ante* nor *ex post* protections. There is, to be sure, "an obvious need to conduct our government efficiently, expeditiously, effectively, and inexpensively," but "the interest in involving affected parties in rulemaking is not so slight that it should be set aside solely on the basis of minor inconvenience or expense to government." Bonfield, *supra* page 7, at 106.

Indeed, as Prof. Manning notes, "[e]ven if rejection of *Seminole Rock* marginally increased agency reluctance to rely on rulemaking . . . that result would be attributable to the fact that agencies would finally be internalizing the cost of adopting unobvious or vague regulations." Manning, 96 Colum. L. Rev. at 694. When agencies are required to choose between either *ex ante* notice-and-comment or *ex post* judicial review, they face what scholars have called the "pay me now or pay me later" principle, a "doctrinal compromise" intended to prevent agencies from "escaping both procedural constraints and meaningful judicial scrutiny." Stephenson & Pogoriler, 79 Geo. Wash. L. Rev. at 1464 (quoting E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1491-92 (1992)). So long as agencies know that *Seminole Rock* saves them from having to "pay later," full judicial enforcement of the APA's *procedural* requirements is the means by which

courts can ensure that agencies at least "pay now." *Am. Mining Cong.*, 995 F.2d at 1111 (quoting Elliott, *Reinventing Rulemaking*, 41 Duke L.J. at 1491 ("As in the television commercial in which the automobile repairman intones ominously 'pay me now, or pay me later,' the agency has a choice")).

To that end, the D.C. Circuit's decisions in *Paralyzed Veterans*, *Alaska Hunters*, and the decision under review, attempt to ensure that the APA's procedural requirements are obeyed not just in form, but in function—by prohibiting an agency from "in effect amend[ing]" its previously promulgated legislative rule, "something it may not accomplish without notice and comment." *Alaska Hunters*, 177 F.3d at 1034. They "look to whether the interpretation itself carries 'the force and effect of law,'" and if it does, they enforce the APA's notice-and-comment requirement. *Paralyzed Veterans*, 117 F.3d at 588; *see also Am. Mining Cong.*, 995 F.2d at 1109 ("Our own decisions have often . . . inquir[ed] whether the disputed rule has 'the force of law'.").

The APA's framers, like the D.C. Circuit, understood that "it is quite difficult to draw a line between substantive and interpretative rules." *Paralyzed Veterans*, 117 F.3d at 587. But they obligated the courts to draw those difficult lines nonetheless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Nos. 13-1041 and 13-1052

In the

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, *et al.*,
PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION, *et al.*,
RESPONDENTS,

JEROME NICKOLS, *et al.*, PETITIONERS,

v.

MORTGAGE BANKERS ASSOCIATION,
RESPONDENT

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Under the Administrative Procedure Act, can an agency use an "interpretive rule" to change long-standing legal obligations of the regulated community?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Problem Presented by this Case Is Rooted in the Court's Decisions Granting Deference to an Agency's Interpretations of Its Own Rules. 3

A. The current predicament is rooted in the deference created by *Seminole Rock* and *Auer*. 3

B. This deference violates the constitutional separation of powers. 6

C. This violation places a substantial burden on the regulated community to risk the loss of litigation in a dispute over interpretation 10

II. An Interpretive Ruling Cannot Change Substantive Legal Obligations. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) ..... passim

Bowels v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... passim

Buckley v. Valeo,
424 U.S. 1 (1976) 8

Chevron USA Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 9

Christensen v. Harris County,
529 U.S. 576 (2000) 3

Christopher v. SmithKline Beecham Corp.,
132 S.Ct. 2156 (2012) 1, 2, 11

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 13, 15

Department of Transportation v. Association of American Railroads,
No. 13-1080 (2014) 1

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 5, 9, 10

Gen. Elec. Co. v. Gilbert,
429 U.S. 125 (1976) 11

Gonzalez v. Oregon,
546 U.S. 243 (2006) 5

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993) 11

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987).....11

INS v. Chadha,
462 U.S. 919 (1983).....7

Kilbourn v. Thompson,
103 U.S. 168 (1880).....7, 8

Long Island Care at Home Ltd. v. Coke,
551 U.S. 158 (2007).....13

Mistretta v. United States,
488 U.S. 361 (1989).....7, 8

Mortgage Bankers Ass'n v. Harris,
720 F.3d 966 (D.C. Cir., 2013).....4, 13, 14

Morton v. Ruiz,
415 U.S. 199 (1974).....13

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....5, 9, 10

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008).....10

Sackett v. Environmental Protection Agency,
132 S.Ct. 1367 (2012).....1

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514 U.S. 87 (1995).....3, 13, 15

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131 S.Ct. 2254 (2011).....2, 5, 11

Thomas Jefferson U. v. Shalala,
512 U.S. 504 (1994).....11

United States v. Mead Corp.,
533 U.S. 218 (2001).....10

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418 U.S. 683 (1974).....8

Watt v. Alaska,
451 U.S. 259 (1981).....11

Statutes

5 U.S.C. § 553(a)-(b) 13, 14

5 U.S.C. § 553(b)(3)(A) 13

5 U.S.C. § 706 10

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Madison, James, Federalist 48, THE FEDERALIST PAPERS.....7

Madison, James, Federalist 51, THE FEDERALIST PAPERS.....6

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence[1] is a project of the Claremont Institute, a nonprofit organization whose mission is to restore and uphold the principles of the American Founding, including the structure of government defining a vital separation of powers principle set out in the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance touching on administrative law, including *Department of Transportation v. Association of American Railroads*, No. 13-1080 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012); and *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies – that oversight requires active judicial review of the interpretation and application of ambiguous regulations.

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[1] Pursuant to this Court's Rule 37.3, the petitioners in *Nickols* and the respondents in both cases have filed blanket consent for amicus. The Solicitor General has granted consent for this brief and that letter has been lodged with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court in this case confronts a problem that has its roots in the deference granted to administrative agencies in *Bowels v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Although the Court has increasingly limited this deference, *see e.g. SmithKline*, 132 S.Ct. at 2166-2167, the doctrine continues to allow administrative agencies to exercise power that properly belongs to the judiciary. As Justice Scalia recently pointed out, it is contrary to the basic principles of our government to allow the same person who promulgates the law also to interpret it. *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254, 2266 (2011) (Scalia, J., concurring). The deference shown under *Seminole Rock* and *Auer* encourages agencies to use interpretive rules and pronouncements rather than notice-and-comment rulemaking to change the substantive rights and obligations of the regulated community. Because neither the Constitution nor the Administrative Procedures Act permits agencies to alter settled legal expectations of the regulated community through interpretive rules, this Court should deny the petitioners' request and require that the Department of Labor use notice-and-comment rulemaking to change the legal obligations of the regulated community.

ARGUMENT

I. The Problem Presented by this Case Is Rooted in the Court's Decisions Granting Deference to an Agency's Interpretations of Its Own Rules.

A. The current predicament is rooted in the deference created by *Seminole Rock* and *Auer*.

The difficulty presented in the present case is not altogether unique but rather represents an extension of the precedent set forth in *Seminole Rock* and *Auer*. In the former case, this Court determined that an agency's interpretation of its own regulations would be given "controlling weight." *Seminole Rock*, 325 U.S. at 414. Unless the agency's interpretation was plainly erroneous or inconsistent with the regulation, the Court instructed the judiciary to defer to the agency's construction of its own regulation. *Id.* Reiterated more recently in the latter case, this doctrine has since become known as *Auer* deference. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

As evident in this action, however, this deference creates the problem of allowing an agency to redefine substantive legal obligations via informal "interpretations." Where interpretive rules are designed to allow agencies to give notice to their understanding of a regulation, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995), under *Auer* deference they become far more than that as courts must look to them as the last word in determining the meaning of a regulation. *Seminole Rock*, 325 U.S. at 414 (describing the agency's interpretations as the "ultimate criterion").

Relying on the deference granted in *Seminole Rock* and *Auer*, agencies can issue interpretive rules that change long-standing substantive legal obligations, knowing that courts will not disturb those decisions. Agencies are thus encouraged to simply "reinterpret" a regulation rather than use the more exacting procedures of notice-and-comment rulemaking, where their final decisions are subject to judicial review. As a result, *Auer* deference begets the very problem that arises in the present case: namely, an agency using "interpretive" rules to accomplish substantive regulatory changes that otherwise would require notice-and-comment rulemaking.

Here, the Department of Labor promulgated a rule pursuant to the Fair Labor Standards Act outlining the basic contours of the definition of "administrative" employees who are not subject to the Act's overtime requirements. In 2006, the Department issued an opinion letter to the Mortgage Bankers Association indicating that mortgage loan officers—whose work duties conformed to certain typical responsibilities—were "administrative" employees under the Act and the Department's regulation. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 968 (D.C. Cir., 2013).

In 2010, the agency reversed its position, withdrew its previous opinion letter, and determined that these same mortgage loan officers were no longer "administrative" employees under the regulation and the Act. *Id.* Where the employees were not previously subject to overtime pay rules, now they would be. This reversal substantially altered the substantive rights and obligations of employers under the Act and regulations. The Department accomplished this change in

legal obligations without any change in the law or the regulation.

Because *Seminole Rock* and *Auer* require courts to defer to these interpretations, the Department of Labor escapes the obligation of seeking a change in the law by Congress, or even by its own notice-and-comment rulemaking. The irony is that final rules adopted pursuant to notice-and-comment rulemaking are subject to judicial review but the "interpretation" by the agency is not. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 639 (1996).

Auer deference encourages agencies to promulgate broad ambiguous regulations that are susceptible to multiple—even conflicting—interpretations. *Talk America, Inc.*, 131 S.Ct. at 2266 (Scalia, J., concurring); Manning, *supra* at 683. Interpretive rules and changes in interpretation are much easier than changing regulations through the notice-and-comment process. An agency can switch its view of the legal requirements of its regulations without the need to explain the basis for that change. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Since courts must generally defer to the interpretation, the agency escapes judicial review of its actions.

Although the Court has indicated that it will not defer to interpretation of those regulations that merely parrot statutory language, *Gonzalez v. Oregon*, 546 U.S. 243, 257-58 (2006), *Auer* deference encourages the promulgation of regulations that do little

more than restate the statute. Manning, *supra* at 683. These broad and ambiguous regulations, in turn, allow agencies to escape notice-and-comment rulemaking and judicial review of substantive changes in legal rules.

In this way, the problem here posed is the offspring of the far-reaching deference shown under *Seminole Rock* and *Auer*.

B. This deference violates the constitutional separation of powers.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, ,Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-

JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S.

at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law. *United States v. Nixon*. 418 U.S. 683, 704 (1974) ("[T]he judicial power. . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The deference shown under *Seminole Rock* and *Auer*, however, does just that by ceding judicial power to the executive. This allows the concentration of power feared by the founding generation. *See* Man-

ning at 674-75. As Professor Manning notes, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield out-sized influence on the agency. *Id.* at 675.

Congress may be able to delegate part of its law-making function to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15.

The power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the executive.

In the present case, the Department of Labor is using an interpretive rule to alter long-standing substantive legal rights and obligations. Had the agency done this by notice-and-comment rulemaking, it would have been obligated to explain the basis for the change and the courts would examine that change under the Administrative Procedure Act. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15. By announcing the change in an interpretive rule, however, the agency seeks to escape that initial judicial review. Instead, the regulated community must assume the courts will simply defer to the Department's decision that the words of the regulation mean something different today than they meant yesterday. This is not how Congress intended the Administrative Procedure Act to operate. When an agency changes its position on legal obligations it imposes on the regulated community, the agency is supposed to proceed by notice-and-comment rulemaking. In that process, the radical change in policy can be adequately scrutinized for the kind of arbitrary and capricious behavior that the Administrative Procedure Act tasks this Court to protect against. 5 U.S.C. § 706; *State Farm*, 463 U.S. at 41.

C. This violation places a substantial burden on the regulated community to risk the loss of litigation in a dispute over interpretation.

The petitioner in *Nickols* argues that in some instances courts may choose not to defer to agency interpretations of their own regulations, citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Good*

Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 272-273 (1981); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976). This Court in *SmithKline* acknowledged several circumstances in which *Auer* deference may be inappropriate: when the agency's interpretation does not reflect a fair and considered judgment, conflicts with a previous interpretation, is merely a convenient litigation position, or is nothing more than a post hoc rationalization. *SmithKline*, 132 S.Ct. at 2166. Yet the possibility that the lower courts may, in some instances, choose to depart from the rule of controlling deference is cold comfort to members of the regulated community confronted with a fresh command imposed via "interpretation."

Even though there are exceptions, the breadth of the deference shown under *Auer* and *Seminole Rock* still imposes a heavy burden on the regulated community. On the one hand, as indicated previously, it encourages agencies to promulgate broad ambiguous regulations. Manning, *supra* at 683. As Justice Scalia has pointed out, this ambiguity in turn "frustrates the notice and predictability purposes of rulemaking." *Talk America, Inc.*, 131 S.Ct. at 2266 (Scalia, J., concurring); *see also Thomas Jefferson U. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

The lack of notice and predictability increases costs and burdens on the regulated community as the parties subject to the regulation expend resources to acquaint themselves with the complex nature of the law as well as to come into compliance with its often changing requirements. Manning, *supra* at 655.

When agencies can authoritatively interpret the meaning of their own regulations, an agency has little incentive to promulgate clear rules, and the community bears the cost of the resulting ambiguity. *Id.* at 668-69. Because the agency should be incentivized to promulgate clear rules, it should also bear the associated cost of promulgating ambiguous rules—rather than being rewarded with greater power to interpret those rules at a later time.

Additionally, the deference shown under *Auer* places a heavy litigation burden on the regulated community. When an agency suddenly reverses or substantially alters it interpretive posture, then the affected parties face a serious dilemma; they must either expend the resources necessary to comply with the new interpretation or else assume the costs and risks of litigation. The controlling deference shown to these interpretive decisions under *Auer*, however, substantially increases the likelihood of loss in the lower courts and therefore the cost of litigating. As a consequence, many parties within the regulated community will not be able to afford the risk and will easily be coerced into compliance with illegal commands. Agencies can thus accomplish their goals of forcing compliance with a new regulation that may not be consistent with the law

Despite recognized exceptions to *Auer* deference, the breadth of deference that is shown still compels lower courts to defer to agencies' interpretations, even those that bring about substantive changes in the regulation. It therefore continues to place a substantial burden on the regulated community to comply or risk litigation.

II. An Interpretive Ruling Cannot Change Substantive Legal Obligations.

Under the Administrative Procedure Act, agencies must generally promulgate substantive rules pursuant to the notice-and-comment rulemaking process. 5 U.S.C. § 553(a)-(b). Section 553(b)(3)(A), however, exempts "interpretative rules" from this requirement. Although the Department of Labor labeled its 2010 decision as an "Administrator's Interpretation," *Harris*, 720 F.3d at 968, it cannot qualify as an interpretive rule under the Administrative Procedure Act. Because the Department of Labor's new position alters substantive rights under the law and reverses longstanding legal norms, the agency's action cannot be qualified as a mere interpretive rule under § 553(b)(3)(A) and should be subject to the general requirement of notice-and-comment rulemaking procedures.

The purpose of an interpretive rule is to inform the public of the agency's understanding of its own regulations—not to create or alter substantive rights and duties under the laws. The Court has previously explained that interpretive rules are used by agencies to advise the community of the agencies' understanding of statutes and regulations. *Guernsey Mem'l Hosp.*, 514 U.S. at 99. They are not used, however, to alter the substantive legal obligations under the law. That role is reserved to substantive rules. *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 172-73 (2007); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

Thus, where interpretive rules are used only to inform, advise, clarify, or give notice, substantive rules are used to actually change rights and obligations. Rules in the former category are exempted from the notice-and-comment procedure under § 553(b)(3)(A), but rules falling in the latter category must be subject to that process under § 553(a)-(b).

In the present case, the intent of the Department of Labor was to alter legal rights and obligations. In 2006, the Department issued an opinion letter finding that mortgage loan officers qualified for the administrative employee exception to the overtime pay requirements of the Fair Labor Standard Act. *Harris*, 720 F.3d at 968. The purpose of the so-called "interpretative" rule here under review is to reverse that position. *Id.* Without any change to the regulation, the substantive legal rights of employees and obligations of employers have been altered dramatically. The Department has proclaimed that a regulation that meant one thing in 2006 now means precisely the opposite.

The change in the agency's position did not merely advise or inform the public of its interpretation of the administrative exception to the overtime pay requirements. Rather, the agency altered long-standing legal rights and obligations of individuals and businesses who are subject to the Fair Labor Standards Act. This change can only be accomplished by a legislative rule promulgated pursuant to the notice-and-comment procedures mandated by the Administrative Procedure Act.

Though the agency's initial interpretation could arguably qualify as an interpretive rule, the subsequent reversal of that position cannot. The initial 2006 interpretation could be said to clarify rights and obligations that already existed by virtue of the criteria listed in the regulation. Thus, under *Guernsey*, it could potentially qualify as an interpretive rule. Changing the interpretation of those criteria, however, altered individual rights and obligations under the law. Under *Chrysler Corp.*, rules that affect rights and obligations qualify as legislative rules and are subject to notice-and-comment procedures. *Chrysler Corp.*, 441 U.S., at 302.

There is no doubt that an agency is entitled to change its position on the meaning of a statute. Experience should guide the agency to alter its regulations where necessary to implement Congressional policy. Congress has established a process for an agency to do just that. The process is notice-and-comment rulemaking – it is a process that is subject to judicial review and also political accountability in a way that alterations in interpretative rules are not.

CONCLUSION

The Court should require the Department of Labor to use notice-and-comment rulemaking to effectuate the change it seeks. The decision of the court below should be affirmed.

DATED: October 16, 2014.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-1041 and 13-1052

IN THE

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
Petitioners

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondents

JEROME NICKOLS, ET AL., *Petitioners*

v.

MORTGAGE BANKERS ASSOCIATION, *Respondent.*

On Writs Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, AMERICAN HEALTH CARE ASSOCIATION, BUSINESS ROUNDTABLE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE ADMINISTRATIVE PROCEDURE ACT GENERALLY REQUIRES AGENCIES TO SOLICIT PUBLIC FEEDBACK BEFORE MAKING CRITICAL REGULATORY DECISIONS 7

II. ALLOWING AGENCIES TO SWITCH INTERPRETIVE POSITIONS EVEN IN THE FACE OF SIGNIFICANT RELIANCE WOULD EXACERBATE AGENCIES' ATTEMPTS TO EVADE MEANINGFUL NOTICE-AND-COMMENT RULEMAKING 10

A. Leaving the Line Between Legislative and Interpretive Rules Murky Encourages Agencies To Promulgate Vague Legislative Rules 11

B. Judicial Deference to an Agency's Own Interpretation of Its Regulations Increases Agency Incentives To Evade Notice and Comment 13

TABLE OF CONTENTS
(continued)

Page

C. Businesses Already Have To Rely On Interpretive Rules To Provide Critical Guidance Because Agencies Promulgate Ambiguous Substantive Rules 15

D. Allowing Agencies To Depart at Will from Their Relied-Upon Interpretive Positions Would Make These Problems Even Worse 18

III. AT A MINIMUM, THE APA SHOULD BE CONSTRUED TO REQUIRE NOTICE AND COMMENT WHERE AN AGENCY SUBSTANTIALLY DEVIATES FROM ITS RELIED-UPON INTERPRETATION OF AN AMBIGUOUS REGULATION 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

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Air Transp. Ass'n of Am., Inc. v. FAA,
291 F.3d 49 (D.C. Cir. 2002) 26

Alaska Dep't of Envtl. Conservation v. EPA,
540 U.S. 461 (2004) 23

Alaska Prof'l Hunters Ass'n v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) ..... *passim*

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627 F.2d 525 (D.C. Cir. 1980) 23

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519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 14

Caruso v. Blockbuster-Sony Music Entmt. Centre,
193 F.3d 730 (3d Cir. 1999) 11, 16, 22

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402 F.3d 205 (D.C. Cir. 2005) 27

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2011) 14, 15, 20

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441 U.S. 281 (1979) 9

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(continued)

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Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) 14, 15

Dia Navigation Co. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1994) 12, 27

Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011) 24, 27

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FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) 23

Gen. Motors Corp. v. Ruckleshaus, 742 F.2d 1561 (D.C. Cir. 1984) 13

Iowa League of Cities v. EPA, 711 F.3d 844 (8th Cir. 2013) 24, 27

Levesque v. Block, 723 F.2d 175 (1st Cir. 1983) 27

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(continued)

Page(s)

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551 U.S. 158 (2007) 25

MCI Telecommc'ns Corp. v. FCC,
57 F.3d 1136 (D.C. Cir. 1995) 9, 10

Mendoza v. Perez,
754 F.3d 1002 (D.C. Cir. 2014) 24

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131 S. Ct. 1259 (2011) 23

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720 F.3d 966 (D.C. Cir. 2013) 25

Mortg. Bankers Ass'n v. Perez,
No. 12-5246 (D.C. Cir.) 20, 21

Morton v. Ruiz,
415 U.S. 199 (1974) 12

N.C. Growers Ass'n v. United Farm Workers,
702 F.3d 755 (4th Cir. 2012) 24

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105 F.3d 1423 (Fed. Cir. 1997) 13

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394 U.S. 759 (1969) 9

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(continued)

Page(s)

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11 F.3d 186 (D.C. Cir. 1993) 24

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117 F.3d 579 (D.C. Cir. 1997) 16, 20, 25

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56 F.3d 592 (5th Cir. 1995) 12, 24

Shalala v. Guernsey Mem'l Hosp.,
514 U.S. 87 (1995) 12, 25

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567 F.3d 1215 (10th Cir. 2009) 26

Tunik v. Merit Sys. Prot. Bd.,
407 F.3d 1326 (Fed. Cir. 2005) 24

United States v. AMC Entm't Inc.,
549 F.3d 760 (9th Cir. 2008) 16, 22

United States v. Magnesium Corp. of Am.,
616 F.3d 1129 (10th Cir. 2010) 13

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533 U.S. 218 (2001) 9

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(continued)

Page(s)

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Administrative Procedure Act,
5 U.S.C. § 500, *et seq.* 5

5 U.S.C. § 551 8

5 U.S.C. § 553 ..... 8, 23

5 U.S.C. § 704 23

29 U.S.C. § 213(a) 17, 23

42 U.S.C. § 12182 16

42 U.S.C. § 12183 16

OTHER AUTHORITIES

14 C.F.R. § 1.1 17

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14 C.F.R. § 121.1 17

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John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893 (2004) 13

Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000) 20

INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The business community has a particular interest in the interpretation and application of the rules governing the administrative process. Many businesses face an ever-growing thicket of regulations. Because the regulations themselves are often vague or ambiguous, businesses might have no choice but to rely on agencies' definitive interpretations when structuring their activities and investing for their futures. Nonetheless, the Federal and Private Petitioners contend that agencies can change these definitive interpretations at the drop of a hat, without any input from any regulated entity, even where businesses have detrimentally relied on an agency's (previously) settled view. Given the

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

breadth of its membership, the Chamber is uniquely positioned to explain the consequences of accepting that view on the Nation's business community.

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate large industrial facilities that are among the most heavily regulated in the country. AFPM members strive for 100 percent compliance with these regulations and must rely upon federal agency guidance interpreting their scope and applicability. AFPM members are impacted by changes in guidance interpreting federal regulations.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

The American Health Care Association (AHCA) is the Nation's largest association of long-term and post-acute care providers, representing the interests of nearly 12,000 nonprofit and proprietary facilities.

AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA's members operate in a heavily regulated profession, facing a host of complex, often opaque regulations. In order to continue providing quality care and services for frail, elderly, and disabled Americans, they must be able to rely on the agency guidance documents that help them navigate these regulations.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and

Washington, DC, is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

SUMMARY OF ARGUMENT

Imagine you want to start your own hunting-and-fishing guide company in Alaska, one that occasionally transports people by air to remote locations as part of the search for big game. This industry is likely regulated by a host of agencies, and so, like many business owners, you might have to scour the U.S. Code and the Code of Federal Regulations before you start your new venture. Unfortunately, the first two sources aren't much help: Congress told the agency, in essence, to go about doing good in the transportation industry, and the agency's substantive regulations largely repeat that mantra at a lower level of generality—those who transport people "for hire" must comply with all commercial aviation regulations, but without explaining who exactly transports people "for hire." Fortunately, however, the agency explained in definitive interpretive statements that those who transport in your circumstances do so only incidentally and thus need not bear the full brunt of commercial aviation regulation.

Taking the agency at its word, you move to Alaska and structure your business—and your life—around the agency's settled interpretation. Years later, without any input from you, the agency changes its mind. You get a letter advising you that your pilots must qualify as commercial aviators, you may be subject to fines or penalties, and you will at least have to comply going forward.

This scenario is hardly fanciful. *See Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999). It is also troubling because businesses must be able to rely on the interpretive rules that they frequently must consult. On the Federal and Private Petitioners' view, however, the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, stands as no barrier to the agency's interpretive whims. But the APA's notice-and-comment requirements do impose some constraints on an agency's ability to reinterpret its regulations. At a minimum, where an agency has definitively announced its interpretation of a regulation, and where private parties have relied on that interpretation, the agency must give notice and respond to comments before significantly shifting course. This position, consistent with the APA's text and compelled by its purpose, protects the legitimate reliance interests of the regulated community and promotes the APA's basic goals of increasing the effectiveness and accountability of agency decisionmaking through notice and comment.

I. The APA's notice-and-comment requirements embody Congress's efforts to promote fair, effective, and efficient agency action. By generally providing the regulated community the right to know about and participate in agency decisions that will significantly impact its interests, those requirements ensure that agencies have the information and feedback needed to regulate in a factually sound, publicly accountable manner.

II. Agencies, taking advantage of current administrative law doctrines, already attempt to avoid meaningful public participation by promulgating vague legislative rules and then

interpreting those rules to reach the potentially controversial regulatory outcomes that the agencies seek. Allowing agencies to reverse their definitive, relied-upon interpretations without notice and comment would make this situation even worse.

A. If courts had clearly demarcated the line between legislative and interpretive rules, they could strike down agency attempts to circumvent notice and comment in this fashion. But as confusion in the lower courts indicates, courts have struggled to draw—and thus to enforce—this line.

B. The problem of agencies avoiding the notice-and-comment process grows more troubling when one considers the deference that courts give to an agency's interpretation of its own ambiguous regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). Under *Auer*, agencies can thwart meaningful feedback by promulgating vague legislative regulations and then interpreting those regulations as they see fit, knowing that courts must accept those interpretations as long as they are not patently incompatible with the statutory or regulatory text.

C. As demonstrated by the line of D.C. Circuit cases establishing that agencies must engage in notice and comment before reversing their prior definitive interpretations, the statute books and the Code of Federal Regulations often leave regulated entities in the dark about some of the most basic questions surrounding the regulatory regimes that impact them. As a result, regulated entities must rely—and must be able to rely—on the interpretive rules that agencies issue to resolve these crucial questions.

D. The rule advocated by the Federal and Private Petitioners would make things worse. By allowing agencies to *switch* definitive interpretations even in the face of substantial reliance, they would further decrease the costs to the agency of promulgating vague substantive regulations and then interpreting them as they see fit, thus jeopardizing the purposes underlying the APA's notice-and-comment requirements. They would also threaten the substantial reliance interests of the regulated community. Although other legal doctrines may protect those interests against agency reversals as well, the scope of that protection is unclear and may not suffice in every case.

III. This Court need not allow these dangers to come to pass. It and the lower courts have always interpreted the APA with an eye toward the need for fairness and predictability. Under that practical approach, agencies should be required to follow the requirements of notice and comment before reversing their definitive, relied-upon interpretations because in such situations the agency has effectively amended a legislative rule.

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT GENERALLY REQUIRES AGENCIES TO SOLICIT PUBLIC FEEDBACK BEFORE MAKING CRITICAL REGULATORY DECISIONS.

Any set of procedural rules governing agency decisionmaking must address a basic tension in administrative law: On the one hand, agencies must have enough flexibility to respond to new problems, new information, and new political conditions

relatively quickly. On the other hand, those affected by agency decisions must have their fair say for agencies to regulate in an informed and well-reasoned manner.

The APA's notice-and-comment requirements embody Congress's attempt to strike a balance between fairness and flexibility. To protect the public's right to participate in essential agency decisions, Congress broadly defined a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ," 5 U.S.C. § 551(4), and generally required agencies to give notice and respond to comments when "formulating, amending, or repealing" a rule, *id.* § 551(5); *id.* § 553(a)–(b). To protect the government's (and the public's) interest in flexible, efficient proceedings, however, Congress also made certain exceptions to this default requirement. Where the need for speed is great, for example, agencies may dispense with notice and comment under the APA's good cause exemption. *See id.* § 553(b)(3)(B). The APA provides a similar exception where the need for or benefits from public input may be modest. In this vein, it exempts procedural rules (because they affect primarily the agency rather than the regulated community) as well as "interpretative rules" and "general statements of policy" (because, when used properly, they simply shed light on the agencies' current thinking). *See id.* § 553(b)(3)(A).

Although the APA thus acknowledges that sometimes an agency must be able to proceed without affording those in the regulated community

a chance to participate, Congress generally dictated that affected parties have the right to help shape the significant administrative decisions that will govern their lives. This Court, for instance, has recognized that "[i]n enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see also, e.g., United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (giving *Chevron* deference to rules promulgated via notice and comment because that "relatively formal administrative procedure tend[s] to foster the fairness and deliberation that should underlie a pronouncement" with the force of law). It has also rebuffed efforts to circumvent notice-and-comment procedures—"designed to assure fairness and mature consideration of rules of general application"—for convenience's sake. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality op.).

Accordingly, this Court has emphasized the important role that notice-and-comment rulemaking plays in the modern administrative state. By generally giving regulated parties the right to participate in important agency decisions, the APA's notice-and-comment requirements "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *MCI Telecommc'ns Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (internal quotation marks omitted). And by encouraging members of the public to share their views on regulatory questions, those requirements

also "assure that the agency will have before it the facts and information relevant to a particular administrative problem" before making critical decisions. *Id.* (internal quotation marks omitted).

II. ALLOWING AGENCIES TO SWITCH INTERPRETIVE POSITIONS EVEN IN THE FACE OF SIGNIFICANT RELIANCE WOULD EXACERBATE AGENCIES' ATTEMPTS TO EVADE MEANINGFUL NOTICE-AND-COMMENT RULEMAKING.

The Federal and Private Petitioners suggest that agencies typically handle the distinction between legislative and interpretive rules appropriately, using the former to promulgate (after notice and comment) legislative rules that impose well-defined legal obligations and using the latter to clarify occasional minor questions about the agency's understanding of its own substantive regulations. Interpretive rules, they note, do not have the "force and effect of law," but "merely [reflect] the agency's present belief concerning the meaning of the statutes and legislative rules that do." Fed. Petrs.' Br. 21 (internal quotation marks omitted, alteration in original); Private Petrs.' Br. 51 (same). And those rules, they insist, do not even "fill statutory gaps," Private Petrs.' Br. 51, but rather "simply . . . inform the public about the agency's own current interpretation of its regulations," Fed. Petrs.' Br. 26.

The reality is much different. As explained below, interpretive rules are critically important in the real world. In what has come to be a typical scenario, Congress passes a broadly worded statute accompanied by an authorization for agency lawmaking. The agency then promulgates an

ambiguous legislative rule that, although preceded by notice and comment, does not address many critical issues. It uses interpretive rules, issued without public feedback, to provide the only truly clear guidance on those issues, guidance that generally binds courts unless it substantially deviates from the statute's or the rule's text.

This scenario is already problematic. Allowing agencies also to switch their definitive interpretive positions despite substantial reliance by regulated parties would exacerbate it further, undermining the APA's basic purposes and depriving the regulated community of its substantial reliance interests.

A. Leaving the Line Between Legislative and Interpretive Rules Murky Encourages Agencies To Promulgate Vague Legislative Rules

As the Federal Petitioners' brief demonstrates, agencies perceive that the notice-and-comment process takes too long and costs too much, and, therefore, they often prefer to avoid it. *See, e.g.*, Fed. Petrs.' Br. 26. Because an agency's initial interpretation need not be preceded by notice and comment, however, agencies could try to avoid much of the hassle involved in meaningful notice and comment: rather than proffer detailed regulations that prompt detailed public criticism, agencies can punt difficult questions, promulgate vague regulations, and then eventually "interpret" those regulations to reach the regulators' desired result without having to respond to dissenting views. *Cf. Caruso v. Blockbuster-Sony Music Entmt. Centre*, 193 F.3d 730, 733–37 (3d Cir. 1999).

Courts could prevent this stratagem by guarding the line between substantive and interpretive rules. This Court has not provided much guidance, however, as to how courts should police that line. For example, the Court has stated that a substantive rule "affect[s] substantial individual rights and obligations," *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), and it has provided the occasional example of a plainly substantive or plainly interpretive rule, *see, e.g.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). But there are no more precise directions for lower courts (and agencies) to apply the distinction in the mine run of cases.

The circuit courts, for their part, have designed a host of tests aimed at determining whether a given rule is legislative or interpretive. One scholar, for instance, has catalogued at least three different approaches to distinguishing between legislative and interpretive rules, including an "agency's label" test, a "substantial impact" test, and a "legal effect" test. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 286–88 (2010).

These tests—"often circular and usually somewhat Delphic," *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1264 (3d Cir. 1994)—have not helped matters much. The lower courts appear to have all but thrown up their hands by declaring the distinction "inherent[ly] vague[]," *Concourse Rehab. & Nursing Ctr. v. DeBuono*, 179 F.3d 38, 46 (2d Cir. 1999), "often illusory," *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995), and "incapable of being drawn with much analytical precision," *Dia Navigation*, 34 F.3d at

1264. In this vein, they also lament that the distinction is "fuzzy," "blurred," and "enshrouded in considerable smog." *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1142 n.14 (10th Cir. 2010) (internal quotation marks omitted).[2]

In light of this professed confusion, lower courts have struggled to guard the line between legislative and interpretive rules. This murkiness emboldens agencies to manipulate and exploit the blured boundary and avoid the costlier aspects of notice and comment by promulgating vague regulations and then making their most important regulatory decisions under the guise of interpretive rules issued without public feedback.

B. Judicial Deference to an Agency's Own Interpretation of Its Regulations Increases Agency Incentives To Evade Notice and Comment

If courts paid little attention to an agency's interpretive position in determining whether someone had complied with a substantive regulation, the troubling incentives created by the fuzzy line between legislative and interpretive rules might not be as worrisome. But, to the contrary, this Court has

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[2] *See also, e.g.*, Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705, 1705 (2007) ("To describe the legislative rule debate is to conjure doctrinal phantoms, circular analytics, and fundamental disagreement even about correct vocabulary."); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

held that an agency's interpretation of its own regulation "control[s] unless [it is] plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted); *see also, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337–38 (2013) (deferring to the agency's interpretation and emphasizing that the interpretation need not reflect the "best" reading of the regulation); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (similar). Rather than force agencies to defend their actions based on the terms of their own substantive regulations, courts thus defer to an agency's interpretation—promulgated without notice and comment—even where that interpretation falls outside the most natural reading of the regulation itself.

As a doctrinal matter, *Auer* "undoubtedly has important advantages"—for example, it imparts "certainty and predictability to the administrative process" by creating uniformity in the circuit courts in most cases. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 & n.17 (2011) (internal quotation marks and alterations omitted). But it also raises serious concerns. *See Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., joined by Alito, J., concurring) (expressing willingness to reconsider *Auer*); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (explaining that he will no longer apply *Auer*). Agencies may not have special insight into what their regulations say, and their policy expertise is arguably irrelevant to the purely interpretive task of figuring out what the law is. *See id.* at 1340 (Scalia, J., concurring in part and dissenting in part). Moreover, *Auer* deference threatens separation-of-powers principles if the same

body in charge of promulgating the law, an executive agency, gets to decide what the law means upon enforcement. *See id.* at 1341–42; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 638–54 (1996).

Whatever the merits of *Auer* on the whole, this Court has recognized that it is not an unalloyed good. As most relevant here, it has acknowledged that *Auer* deference—like the fuzzy line between legislative and interpretive rules—may encourage agencies to evade meaningful notice and comment. As the Court recently put it, *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking." *Christopher*, 132 S. Ct. at 2168 (2011) (internal quotation marks and alterations omitted).

C. Businesses Already Have To Rely On Interpretive Rules To Provide Critical Guidance Because Agencies Promulgate Ambiguous Substantive Rules

The concern that agencies will use the opportunities incidentally provided by the doctrines discussed above to circumvent meaningful notice and comment, and will instead rely on interpretive rules to make their most controversial decisions, is more than theoretical. The cases applying the *Paralyzed Veterans* doctrine at issue here demonstrate this vividly.

Consider *Paralyzed Veterans* itself. The Americans with Disabilities Act broadly states that "[n]o individual shall be discriminated against on the

basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" and that newly constructed facilities must be "readily accessible to and usable by individuals with disabilities." *Paralyzed Veterans of Am. v. D.C. Arena LP*, 117 F.3d 579, 580 (D.C. Cir. 1997) (quoting 42 U.S.C. §§ 12182(a), 12183(a)(1) (1994)).

To "flesh out" these admittedly "general principles," *id.*, the Department of Justice promulgated regulations regarding wheelchair access in public venues, but those regulations were ambiguous—perhaps intentionally so—on a critical point: whether wheelchair users must be able to see over the patrons seated in front of them even when those patrons were standing. *See id.* at 581–82; *Caruso*, 193 F.3d at 732–37. As a result, those building multi-million-dollar entertainment venues—perhaps the prototypical example of parties who need legal certainty and whose reliance interests deserve protection—were left to make decisions about design and structure based only on inconsistent agency statements and a later, conflicting interpretive rule, materials fuzzy enough to soon create a circuit split. *See United States v. AMC Entm't Inc.*, 549 F.3d 760, 764–67 (9th Cir. 2008) (tracing the difficulty courts have had interpreting the regulation at issue).

Alaska Professional Hunters Association v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), drives the point home further. There, the statutory provisions governing the FAA's conduct were sufficiently irrelevant that they did not warrant a mention in the court's opinion. *See id.* at 1030–36. And the FAA

regulations, for their part, explained that "commercial operators"—those subject to a host of regulatory requirements—included those who carried people or property "for compensation or hire," *see id.* at 1031 (quoting 14 C.F.R. §§ 1.1, 119.1(a)(1), 121.1(a), 135.1(a)), but provided little insight into whether guide flights conducted as part of other activities would count as flights "for compensation or hire" or would be considered "merely incidental" and thus exempt. As a result, Alaska's hunting and fishing industry—one on whose income "[a] large proportion of the State's population depend[ed]"—could not determine its basic legal obligations by consulting the statute books and the Code of Federal Regulations, but instead had to rely upon an interpretive rule embodied in a Civil Aeronautics Board decision and decades of statements from regional agency officials. *Id.*; *see id.* at 1031–32.

Indeed, this case itself proves the importance of interpretive rules. The Fair Labor Standards Act exempts "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman" from its mandatory overtime provisions. 29 U.S.C. § 213(a)(1). Department of Labor regulations provide some additional guidance about these broad categories. They explain, for example, that "administrative" employees must have as their "primary duty . . . the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," a duty that must "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(2)–(3).

The regulations do not, however, clearly explain how to apply these rules in the real world, where many employees perform a variety of tasks without any one taking obvious pride of place. In this regard, the regulations specify that "[e]mployees in the financial services industry generally meet the duties requirements for the administrative exception if their duties include" tasks such as "collecting and analyzing information regarding the customer's income, assets, investments or debts" or "marketing, servicing or promoting the employer's financial products," but in the same breath declare that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. § 541.203(b). In light of this ambiguity, regulated parties such as the Mortgage Bankers Association often have no choice but to seek out and rely upon definitive interpretive guidance from agency officials; the statute and the regulations simply leave too many important questions unanswered to do otherwise.

D. Allowing Agencies To Depart at Will from Their Relied-Upon Interpretive Positions Would Make These Problems Even Worse

Both as a matter of doctrine and as a matter of practice, then, agencies already face and act upon incentives to avoid meaningful public scrutiny of their conduct by promulgating vague substantive regulations and then interpreting them to address the important issues actually at stake. The Federal and Private Petitioners would make this problem worse by allowing agencies to switch interpretive positions without notice and comment, even in the face of substantial reliance by the regulated

community. This attempt, if allowed, would undermine the basic purposes of the APA and the reliance interests of regulated entities.

Consider first the distinction between legislative and interpretive rules. Because courts have struggled to articulate a clear line between interpretive and substantive rules, an agency could promulgate an ambiguous regulation in the first place and then, without having to respond to the concerns of the regulated community, merely interpret that rule to reach any of the results it desires. But even then, no matter how much anyone had relied on the agency's definitive interpretation, it could later change its mind, again without any feedback from the public. By lowering the costs of definitive interpretations, the Federal and Private Petitioners would make it easier for agencies to preserve their own flexibility while evading meaningful notice and comment.

Deferring to an agency's interpretive position where it has suddenly changed its view despite substantial reliance also brings into focus the problems associated with *Auer*. By acting in such a fashion, the agency demonstrates its lack of special insight into the regulation's meaning—it has, after all, changed its mind. Such agency flip-flopping also presents the chief danger that the Constitution's separation of lawmaking from law interpreting aims to prevent: discretion on the part of lawmakers to subject parties to "laws" that mean whatever the lawmakers later say they do, despite even their own prior interpretation. Finally, deference in such circumstances further strengthens agencies' incentive to promulgate vague regulations and then

interpret them to mean what they want—they can avoid the hassles of notice and comment while maintaining maximum flexibility to do as they please, even when what they want changes over time.[3]

To be sure, this Court has placed outer limits on an agency's ability to engage in such tactics. *See Christopher*, 132 S. Ct. at 2166–68 (refusing to defer to the agency's recently announced view because it would impose "potentially massive liability" on "decades-long" conduct that the agency consciously ignored). It is not clear, however, just how broad that protection from *Auer* is. And even if, as the Department of Labor argued below, some agency flip-flops deserve only *prospective* deference, *see* Br. for the Federal Appellees at 45, *Mortg. Bankers Ass'n v. Perez*, No. 12-5246 (D.C. Cir.),[4] that result would

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[3] Even those who criticize the *Paralyzed Veterans* doctrine acknowledge that it has considerable utility so long as courts defer to interpretive rules. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 569 (2000) (noting that *Paralyzed Veterans* might have been inspired by concerns about such deference and that "[i]t is troubling to give nearly as much force to a rule that is adopted with no procedural safeguards as to a rule that is adopted only after conducting a notice and comment rulemaking").

[4] Tellingly, the Federal Petitioners' brief fails to even mention *Auer*. Although the Private Petitioners now rely on *Christopher* in arguing that regulated parties should not fear agency flip-flops, *see* Private Petrs.' Br. at 42–44, they demanded *Auer* deference before the lower courts and suggested that such deference was inappropriate only where an agency's revised view created unfair surprise, *see* Br. for

still give cold comfort to many. What if, for example, you had moved to Alaska and set up a business in reliance on an agency's definitive interpretation, only to be told later on that—as a "prospective" matter—your business model would no longer work in light of the agency's new, binding interpretation, promulgated without your input? *See Alaska Prof'l Hunters*, 177 F.3d 1030.

The Federal and Private Petitioners' position would thus give agencies additional means to evade meaningful notice and comment by promulgating vague legislative rules and leaving everything essential up to interpretation. Allowing that result would create serious problems. For one thing, it would undermine the APA's notice-and-comment provisions by allowing agencies to change some of their most important regulatory decisions, hardened over time through definitive, consistent interpretation, without any feedback from the regulated community.

For another, it would threaten the reliance interests of those who, because of the agency's ambiguous legislative regulations, must structure their affairs around interpretive rules. Although the Due Process Clause and administrative law protections such as arbitrary and capricious review would guard against the *most* egregious threats to reliance interests, the high barriers posed by some of these doctrines might not shield reliance interests in the ordinary case where an agency changes its mind

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(continued...)

Intervenors-Appellees at 36 n.13, *Mortg. Bankers Ass'n v. Perez*, No. 12-5246 (D.C. Cir.).

to the detriment of regulated parties. Indeed, as explained above, they likely would not protect against agency efforts to subject regulated parties to new interpretations going forward, even though those parties may have "had no opportunity to participate in the development" of the substantive *or* interpretive rules that will now so seriously affect their lives. *Alaska Prof'l Hunters*, 177 F.3d at 1035.

III. AT A MINIMUM, THE APA SHOULD BE CONSTRUED TO REQUIRE NOTICE AND COMMENT WHERE AN AGENCY SUBSTANTIALLY DEVIATES FROM ITS RELIED-UPON INTERPRETATION OF AN AMBIGUOUS REGULATION.

This Court should not jeopardize the legitimate and significant reliance interests of regulated entities by allowing agencies to materially change their definitive interpretive positions at will. Under the practical interpretive approach that the APA demands, where regulated entities have legitimately relied upon an agency's previous interpretation, the agency must give notice before reversing its definitive interpretation. In those circumstances, the agency has effectively amended a legislative rule, the classic example of behavior demanding notice to and an opportunity to comment by those affected by the agency's decisions.

The APA is not some narrow, technical statute governing a specific subject matter. Rather, its basic framework governs a bewildering variety of agencies and agency actions, setting the ground rules for administrative law generally. As a result, its provisions should not be interpreted mechanically, but instead must be flexibly and pragmatically

applied with a view toward the Act's basic purposes. Indeed, this Court has already recognized as much. It has, for example, emphasized that what constitutes "final agency action" for purposes of the APA's judicial review provision (5 U.S.C. § 704) must be determined in a "pragmatic way," *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (internal quotation marks omitted), sensitive to the "practical and legal consequences" that an agency's actions have on others, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004); *see also, e.g., Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1276 (2011) (Breyer, J., dissenting on other grounds) (emphasizing that the Court has "long[] recogni[zed]" that the APA "cannot [be] interpret[ed] . . . with the linguistic literalism fit for interpretations of the tax code" but must instead be given a "practical approach").

Lower courts, too, have emphasized that the APA's provisions in general—and its notice-and-comment requirements in particular—must be interpreted in light of the essential protections they afford to the regulated community. Congress established those provisions to ensure that "the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice," in order to ensure that "the governors shall be governed and the regulators shall be regulated." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (internal quotation marks omitted). "Mindful" of these purposes, courts have been "careful to construe § 553(b)(A)'s exceptions"—including the interpretive rule

exception—"narrowly." *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).[5] They have also interpreted them functionally, asking (for example) "whether the substantive effect" of the rule in question "is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA" in determining whether a rule falls within the procedural rule exception to notice and comment. *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (internal quotation marks omitted); *see also, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (holding that a rule was substantive rather than procedural in part because it "impose[d] [so] directly and significantly upon so many members of the public").

Both this Court and the circuit courts have thus given the APA what its broad text and applicability demand: pragmatic interpretations sensitive to the impact that agency actions have on the public at large and the regulated community in particular. Under that approach, agencies must give notice of their preferred interpretation and respond to comments before reversing their prior definitive,

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[5] A host of other circuits have followed suit. *See, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (internal quotation marks omitted); *N.C. Growers Ass'n v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012); *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 201 (2d Cir. 2010); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1344 (Fed. Cir. 2005); *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 885–86 (9th Cir. 1992); *Profls & Patients for Customized Care*, 56 F.3d at 595.

relied-upon interpretations because in those circumstances, the agency's action has the practical effect of overruling a prior legislative rule to the parties' detriment.

As discussed above, courts have struggled to differentiate between legislative and interpretive rules. *See supra* 11–14. Nonetheless, the factors they have considered in drawing that line demonstrate that "a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter," *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013), at least where the prior interpretation has been substantially relied upon.[6]

Consider first the main question courts ask in distinguishing between legislative and interpretive rules: does the rule itself "affect[t] individual rights and obligations" in a binding manner, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007) (internal quotation marks omitted), or does it merely "advise the public of the agency's construction of the statutes and rules which it administers"? *Guernsey Mem'l Hosp.*, 514 U.S. at 99. Where the rule "carries

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[6] The D.C. Circuit decision below, focusing on the meaning of its own prior cases, held that reliance was not a prerequisite to requiring notice and comment before an agency changes its definitive interpretation. *See Mortg. Bankers Ass'n*, 720 F.3d at 970–72. *Amici* agree with that position for the reasons explained in the Mortgage Bankers Association's brief, *see* Resp.'s Br. 36–45, but, as explained below, notice and comment is at least required where parties have substantially relied on the agency's prior position.

the force and effect of law" and does not simply "spell[] out a duty fairly encompassed within the regulation that the interpretation purports to construe," it is legislative, not interpretive, and must come from notice and comment. *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55–56 (D.C. Cir. 2002) (internal quotation marks, alteration, and emphasis omitted); *see also, e.g.*, *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009) (similar).

From the regulated party's perspective, changing definitive interpretive positions notwithstanding industry reliance feels much like changing the applicable law and imposing new obligations midstream. To be sure, the agency cannot rely entirely on either interpretive rule in any enforcement action; it must ultimately be able to support its position by reference to the underlying legislative rule. This fact, however, provides little comfort given *Auer* deference. Because of *Auer*, the agency's interpretation of a party's obligations under a (broad, ambiguous) legislative rule will be just as binding as the legislative rule itself unless the party can show that the interpretation is not just wrong, but unambiguously so, the same demanding standard parties must meet when challenging a legislative rule under *Chevron*.

As a result, it makes little sense to sharply distinguish between the legal force of a legislative rule and the force of its definitive, relied-upon interpretation; both create essentially new obligations, just at different levels of generality. And as a result, it makes plenty of sense to see reversals of definitive, relied-upon interpretations for what they practically are—amendments to a pre-existing

legislative rule, one that has naturally and predictably guided private conduct. *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) ("As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity."); *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 ("[T]he purpose of the APA would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations.").

Beyond looking at the legal force of the rule in question, courts have also stated that "the substantial impact of a rule [on the regulated community] is relevant to its classification" as legislative or interpretive. *Dia Navigation*, 34 F.3d at 1265; *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983) (similar); *see also, e.g.*, *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 (noting that the rule in question "substantially change[d] the [screening] experience of airline passengers" in concluding that it was a legislative rather than interpretive rule).[7] This

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[7] Others have rejected the relevance of this factor to the inquiry, *see, e.g., Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005), but it deserves at least some weight. As a legal matter, particularly significant rules are more likely to impose new obligations on regulated parties rather than merely give details into old obligations—that is, after all, a large part of why they are important. And as a policy matter, particularly significant rules deserve notice

factor weighs strongly in favor of requiring notice and comment before an agency changes its interpretive position in the face of substantial reliance. By definition, the agency's new position in such circumstances will impact regulated entities—they have structured their affairs around the agency's settled view, and yet the agency's new position could upend years of planning and substantial investments. Like the essentially binding nature of definitive interpretations, the effect of agency reversals on the public at large indicate that those reversals may properly count as amendments of a legislative rule for purposes of the APA.

* * *

The business community needs to know that it can rely upon the interpretive rules that increasingly affect its day-to-day operations. By requiring agencies to ask for and respond to public feedback before changing definitive, relied-upon agency interpretations, this Court can protect those reliance interests and foster the APA's goals of increasing the effectiveness and legitimacy of agency decisionmaking through notice-and-comment rulemaking.

CONCLUSION

For the reasons stated above and by the Respondent, the decision below should be affirmed.

(continued...)

and comment in order to increase their effectiveness and legitimacy, particularly given the hazy line between legislative and interpretive rules.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-1041 and 13-1052

IN THE

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
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v.

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BRIEF FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of Argument 4

Argument 6

I. *Paralyzed Veterans* Comports With The Purpose And Text Of The APA 7

A. *Paralyzed Veterans* is a modest rule that furthers the APA's goals of fair regulatory procedures and rational regulations 7

B. The APA's text justifies the *Paralyzed Veterans* approach 10

1. Courts determine whether an agency rule is legislative or interpretive 10

2. If a rule significantly amends an agency's existing definitive interpretation of a regulation, it is not an interpretive rule 11

II. Regulation By "Interpretive Rule" Leads To Greater Public Costs And Uncertainty 14

A. The EPA's recent interpretive rule regarding agricultural conservation practices demonstrates the need for procedural regularity 14

B. Sudden reversals by agencies create significant retroactivity concerns 19

1. The Department of Labor's "interpretive rule" in *Christopher* v. *SmithKline* would have unfairly upset significant reliance interests 19

2. An agency about-face has exposed Nevada farmers to retroactive liability 22

C. Notice-and-comment rulemaking led OSHA to pass a more rational regulation and prevented the imposition of needless costs 23

Conclusion 27

TABLE OF AUTHORITIES

CASES **Page**

ABKCO Music, Inc. v. *LaVere*,
217 F.3d 684 (9th Cir. 2000) 13

Air Transport Association of America v. *FAA*,
291 F.3d 49 (D.C. Cir. 2002) 9

Alaska Professional Hunters Association, Inc. v. *FAA*,
177 F.3d 1030 (D.C. Cir. 1999) 5, 7, 9, 12

American Hospital Association v. *Bowen*,
834 F.2d 1037 (D.C. Cir. 1987) 8, 9, 11

American Mining Congress v. *Mine Safety & Health Administration*,
995 F.2d 1106 (D.C. Cir. 1993) 9

Association of American Railroads v. *Department of Transportation*,
198 F.3d 944 (D.C. Cir. 1999) 9

Auer v. *Robbins*,
519 U.S. 452 (1997) 12, 21

Brown v. *Thompson*,
374 F.3d 253 (4th Cir. 2004) 13

Budd Co., 1 BNA OSHC 1548 (no. 74-1256, 1974),
aff'd, 513 F.2d 201 (3d Cir. 1975) 24

Chamber of Commerce v. *Occupational Safety and Health Administration*,
636 F.2d 464 (D.C. Cir. 1980) 11

Christopher v. *SmithKline Beecham Corp.*,
132 S. Ct. 2156 (2012) 13, 19, 20, 21, 22

Chrysler Corp. v. *Brown*,
441 U.S. 281 (1979) 7, 8, 13, 19

Columbia Broadcast System, Inc. v. *United States*,
316 U.S. 407 (1942)..... 11

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 11

Gutierrez v. *Ada*,
528 U.S. 250 (2000) 11

Hoctor v. *U.S. Department of Agriculture*,
82 F.3d 165 (7th Cir. 1996)..... 8

In re Novartis Wage and Hour Litigation,
611 F.3d 141 (2d Cir. 2010) 20

Landgraf v. *USI Film Products*,
511 U.S. 244 (1994) 13

Liquilux Gas Corp. v. *Martin Gas Sales*,
979 F.2d 887 (1st Cir. 1992)..... 13

MetWest Inc. v. *Secretary of Labor*,
560 F.3d 506 (D.C. Cir. 2009) 9

North Carolina Growers' Association, Inc. v.
United Farm Workers,
702 F.3d 755 (4th Cir. 2012)..... 9

NLRB v. *Wyman-Gordon Co.*,
394 U.S. 759 (1969) 8

Pan-Atlantic Steamship Corp. v. *Atlantic Coast
Line Railroad Co.*,
353 U.S. 436 (1957) 7

Paralyzed Veterans of America v. *D.C. Arena L.P.*,
117 F.3d 579 (D.C. Cir. 1997) .....*passim*

Piamba Cortes v. *Am. Airlines, Inc.*,
177 F.3d 1272 (11th Cir. 1999)..... 13

Rapanos v. *United States*,
547 U.S. 715 (2006) 14

Rivera v. *Peri & Sons Farms, Inc.*,
735 F.3d 892 (9th Cir. 2013) 23

Rivera v. *Peri & Sons Farms, Inc.*,
805 F. Supp. 2d 1042 (D. Nev. 2011) 23

Shalala v. *Guernsey Memorial Hospital*,
514 U.S. 87 (1995) 11

Syncor International Corp. v. *Shalala*,
127 F.3d 90 (D.C. Cir. 1997) 9

Thomas Jefferson University. v. *Shalala*,
512 U.S. 504 (1994) 14

STATUTES

5 U.S.C. § 551(5) 13

5 U.S.C. § 553(b) 13

5 U.S.C. § 553(b)(A) 8, 10, 11

5 U.S.C. § 553(b)(B) 8

29 U.S.C. §§ 206-207 19

29 U.S.C. § 213(a)(1) 19

29 U.S.C. § 213(a)(1) 19

29 U.S.C. §§ 651-678 24

33 U.S.C. § 1344(a) 14

Clean Water Act of 1977, Pub. L. No. 95-217,
91 Stat 1566 (1977) 15

LEGISLATIVE MATERIALS

H.R. Rep. No. 79-1980 (1946) 7

Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Hearing Before the Subcommittee on Water Resources & Envi-

ronment of the House Committee on Transportation and Infrastructure, 113th Cong. (2014) 17

A Review of the Interpretive Rule Regarding the Applicability of Clean Water Act Agricultural Exemptions: Hearing Before the Subcommittee on Conservation, Energy, and Forestry of the House Committee on Agriculture, 113th Cong. (2014) 18

S. Rep. 79-752 (1945) 10, 11

REGULATORY AUTHORITIES

20 C.F.R. § 655.122(h)(1) 22

29 C.F.R. § 531.3(d)(1) 22

29 C.F.R. § 531.35 22

29 C.F.R. § 1910.132(a) 24

33 C.F.R. § 323.4 15

40 C.F.R. § 232.3 15

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Union Tank Car Co., 18 BNA OSHC 1067, 1997 WL 658425 (No. 96-0563, 1997) 24

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emption for Certain Agricultural Conservation Practice Standards (2014) 15

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IN THE

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MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS *ET AL.* AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici Curiae are the National Federation of Independent Business, the American Farm Bureau Federation, the American Petroleum Institute, the National Association of Home Builders, and the Retail Litigation Center, Inc.[1] Each of these organizations, like their

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution.

members throughout the United States, has a significant interest in the integrity of the federal regulatory process—that, in accordance with the Administrative Procedure Act, federal regulations are enacted and modified efficiently, transparently, and with appropriate input from the regulated public. The web of federal regulations continues to grow at a rapid pace, and regulated entities and individuals must invest considerable resources to understand and comply with them. Given the burdens on the public when agencies enact new rules or change their positions on old ones, procedural regularity is a modest request, made not only by *amici* and their members, but commanded by Congress.

1. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. NFIB's membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses.

2. The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. Rep-

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Letters from all parties consenting to the filing of this *amicus* brief are on file with the Clerk's office.

resenting more than 6 million member families in all 50 States and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to give voice to its members and protect their rights.

3. The American Petroleum Institute (API) is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8% of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 20 million Americans.

4. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates in litigation as a party litigant and *amicus curiae* to safeguard the rights and interests of its

members.

5. The Retail Litigation Center, Inc. (RLC) is a public-policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Each of these *amici* is deeply concerned about the likely legal and economic instability that would attend reversal of the judgment below. Regulatory agencies would increasingly label substantive modifications of binding rules as mere "interpretive rules," which would evade the express statutory requirement of allowing public participation via notice-and-comment rulemaking. In turn, regulated entities would face increasing costs, because the regime governing them would be far less stable and the investments necessary to comply with a given regulation could be largely destroyed when an agency flip-flops on its own interpretation.

SUMMARY OF ARGUMENT

The Administrative Procedure Act was designed not to maximize convenience for the federal bureaucracy, but to ensure regulatory rationality and accountability. If agencies can avoid the Act's procedural checks by labeling legislative rules as mere interpretive rules, agencies will be less informed, and their regulations will be costlier and less predictable for individuals and businesses. Yet the Government's brief openly seeks a green light for just this sort of regulatory transformation.

To preclude end-runs around the APA, and as a modest check on agencies' exercise of substantive power, the D.C. Circuit has held that when an agency "significantly revises" a "definitive interpretation" of an unchanged regulation, it effectively "amend[s]" that regulation. *Alaska Prof'l Hunters Ass'n, Inc.* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); see also *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Thus, to comply with the APA, agencies must provide an opportunity for notice and comment before changing the meaning of a regulation.

Pulling one isolated APA provision from its context, the Government contends that the *Paralyzed Veterans* doctrine violates the APA's text. This argument ignores the rest of the APA's text, which creates a framework that limits agency overreach. The spare grant of authority to enact "interpretive rules" without notice and comment must be read in light of this larger context; the Government's reading would transform a minor and innocuous power into the authority to dispense with the core of the APA in many regulatory contexts. Notice and comment must generally precede significant regulatory changes because agencies' legitimacy depends on rationality and accountability. The Government's construction would encourage agencies to define their way around a vital check that promotes those essential aspects of administrative law. This construction sets the APA at war with itself.

The Government's only practical argument is its dislike of notice-and-comment rulemaking, which it regards as a costly procedure that "can present a formidable *in terrorem* barrier for agencies seeking to" change past interpretations of regulations. Pet. 20; see U.S. Br. 25-26. But notice-and-comment rulemaking is designed to reduce the much greater "*in terrorem*" effect on the public of capricious, ill-considered regulatory swings. It

helps ensure that resulting regulations are rational, workable, and lawful, and it facilitates judicial review. If, as the Government suggests, agencies *fear* procedural regularity, then the public and the courts should be deeply concerned. The administrative process takes time, which may seem irritating to regulators who would prefer to impose changes at once and by fiat. But the benefits of procedural regularity in rulemaking greatly outweigh any perceived costs.

Conversely, as examples provided below by *amici* show and as common sense suggests, regulation by "interpretive rule" inherently injects unpredictability into the regulatory process and reduces agencies' accountability. Without the benefit of notice and comment, these regulations are often costlier and less workable than regulations adopted after more careful consideration. Moreover, while an agency can assign a regulation a new meaning at the stroke of a pen, those subject to the regulation cannot always react so quickly. Far from embracing such regulatory whiplash, the APA constrains it, and the D.C. Circuit's judgment should accordingly be affirmed.

ARGUMENT

Amici agree with the substantive legal arguments made by Respondents. Because their members are also subject to substantial federal regulation, *amici* seek to assist the Court by addressing the legal and practical consequences of this case from the perspective of the wider regulated public. The APA was designed to protect the public from opaque, irrational, and unaccountable agency action. Numerous examples demonstrate the value of the APA's procedural protections and the costs the public incurs when agencies cast these requirements aside.

I. *PARALYZED VETERANS* COMPORTS WITH THE PURPOSE AND TEXT OF THE APA

Congress enacted the Administrative Procedure Act to promote procedural regularity as an essential predicate to allowing agencies to wield vast authority over the public. Notice-and-comment rulemaking is central to this purpose, helping ensure rationality and accountability. It alerts those who are being regulated, like *amici* and their members, to proposed changes in regulations and it allows the public to educate agencies on the effects those changes might have on the ground. The APA exempts interpretive rules from this procedural requirement, but the courts—not the agencies—must determine whether a rule is legislative or interpretive. The purpose and text of the APA makes clear that when "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation," *Alaska Hunters*, 177 F.3d at 1034, the latter rule is not a mere interpretive rule, but is instead a legislative rule and accordingly is subject to the APA's notice-and-comment procedure.

A. *Paralyzed Veterans* is a modest rule that furthers the APA's goals of fair regulatory procedures and rational regulations

"The Administrative Procedure Act, enacted in 1946, was designed to promote general fairness and regularity in administrative action." *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R. Co.*, 353 U.S. 436, 442-443 (1957). Congress recognized a "need for a simple and standard plan of administrative procedure" that could "assure administrative fairness in the beginning so that litigation may become unnecessary." H.R. Rep. No. 79-1980, at 8 (1946).

To that end, the Act limits agency discretion through "procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 303 (1979) (quot-

ing *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)). These safeguards are essential because typically, when an agency acts, "important interests are in conflict." *Id.* at 316. "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Ibid.*

Not every agency decision rises to the level of a regulation governing the public, and so not every agency action is subject to notice and comment. The APA provides that "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" do not have to go through this process. 5 U.S.C. § 553(b)(A). Interpretive rules do not bind the public, but merely "advise the public of the agency's construction of the statutes and rules * * *." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947) (APA Manual).[2]

These lines are not always clear. "Distinguishing between a 'legislative' rule * * * and an interpretive rule," therefore, "is often very difficult * * *." *Hoctor* v. *U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996); see also *Am. Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"). The D.C. Circuit has sought to add clarity by holding that a purported interpretive rule is actually a legislative rule if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties," or "the rule effectively amends a prior legislative

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[2] The APA also provides that agencies can bypass notice and comment when a rule is insignificant or, alternatively, is so significant that it must be implemented immediately. See 5 U.S.C. § 553(b)(B).

rule." *Am. Mining Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). While "considerable smog" still enshrouds the distinction between legislative and interpretive rules, *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90, 93 (D.C. Cir. 1997) (internal quotation omitted), "[i]n light of the obvious importance of [the APA's] policy goals of maximum participation and full information, [courts] have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive." *Am. Hosp. Ass'n*, 834 F.2d at 1044; see also *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (same). In other words, when it is unclear whether an agency action affecting the regulated public is legislative or interpretive, the tie should go to the regulated public.

In *Alaska Hunters*, the D.C. Circuit relied on these principles to hold that when an agency first gives a legislative rule "a definitive interpretation" and later issues a rule that "significantly revises that interpretation," the latter rule effectively "amend[s]" the agency's prior legislative rule, making that action subject to notice and comment. 177 F.3d at 1034. The court, however, has stressed the limited applicability of this doctrine. First, "conditional or qualified statements, including statements that something 'may be' permitted," do not satisfy the definitive-interpretation prong. *MetWest Inc.* v. *Sec'y of Labor*, 560 F.3d 506, 509-510 (D.C. Cir. 2009). Instead, the earlier interpretation must be "express, direct, and uniform * * * ." *Ass'n of Am. R.Rs.* v. *Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999). Regarding the second prong, "so long as a new guidance document 'can reasonably be interpreted' as consistent with prior documents, it does not significantly revise a previous authoritative interpretation." *MetWest Inc.*, 560 F.3d at 510 (quoting *Air Transp. Ass'n of Am.* v. *FAA*, 291 F.3d 49, 57-58 (D.C. Cir. 2002)).

Thus, the *Paralyzed Veterans* doctrine applies only in cabined circumstances, not to interpretive rules that play the limited role that would excuse notice-and-comment rulemaking. Indeed, far from the reign of terror that the Government depicts, *Paralyzed Veterans* has been applied by the D.C. Circuit only three times to require notice and comment. See Pet. App. 6a n.4. In those rare circumstances where both factors are met, *Paralyzed Veterans* protects the interests of parties who have relied on an agency's definitive interpretation of a regulation and ensures that agencies receive valuable public input before completely changing a settled course. In so doing, the doctrine advances the purposes of the APA.

B. The APA's text justifies the *Paralyzed Veterans* approach

1. *Courts determine whether an agency rule is legislative or interpretive*

The Government is correct that the APA exempts interpretive rules from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553(b)(A). But the Government elides the central question of what precisely qualifies as an interpretive rule for purposes of that provision. When agencies cloak their actions by characterizing them as interpretive rules, courts need not listlessly accept agencies' own choice of label. The history of the APA and this Court's precedent establish that an agency cannot bypass the APA's procedural requirements by simply declaring its action to be an "interpretive rule."

Congress did not intend for agencies to be able to unilaterally broaden their power by mislabeling their actions. In 1945, the Senate Judiciary Committee made clear that the Act, "[e]xcept in a few respects, * * * is not a measure conferring administrative powers but is one laying down definitions and stating limitations." S. Rep. 79-752, at 31 (1945). Courts have "the duty * * * to pre-

vent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used." *Ibid.*

Thus, the Court should "not classify a rule as interpretive just because the agency says it is. Instead, 'it is the substance of what the [agency] has purported to do and has done which is decisive.'" *Chamber of Commerce* v. *Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) (quoting *Columbia Broad. System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942)); see also *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) ("Since the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation."); *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 101-102 (1995) (analyzing whether a provision in an agency manual was a substantive or interpretive rule).

2. *If a rule significantly amends an agency's existing definitive interpretation of a regulation, it is not an interpretive rule*

The text and structure of the APA weigh against the capacious definition of "interpretive rule" offered by the Government and confirm that "Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones." *Am. Hosp. Ass'n*, 834 F.2d at 1044. Along with interpretive rules, the APA exempts "general statements of policy" and "rules of agency organization, procedure, or practice" from notice and comment. 5 U.S.C. § 553(b)(A). These additional types of rules provide the context for understanding the kind of "interpretive rule" that Congress immunized from notice and comment. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) ("words and people are known by their companions"). They suggest that the designation does not apply when a rule significantly changes a definitive interpretation of a regulation.

First, rules of agency organization, procedure, or practice concern only how an agency structures its internal affairs. These rules do not change how a regulation is construed or implicate any substantial reliance interests. Next, general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." APA Manual at 30 n.3. Again, these rules might announce an agency's regulatory priorities, but they have no effect on *whether* a regulation applies. Likewise, interpretive rules that "advise the public of the agency's construction of the statutes and rules," *ibid.*, will not implicate reliance interests when they only clarify or flesh out a regulation.

But once an agency provides its definitive interpretation, regulated parties are justified in structuring their affairs around that version of the regulation. Indeed, considering the level of deference that courts afford these interpretations, and that agencies demand, private parties ignore them at their own peril. See *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997).[3] A later rule that replaces a previous definitive interpretation with a completely contrary interpretation does not simply clarify the regulation, but instead effectively alters its meaning. See *Alaska Hunters*, 177 F.3d at 1034. As such, "notions of fairness and informed administrative decisionmaking require that [such] agency decisions be made only after

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[3] Recent studies have found that when *Auer* deference has been applied, courts overwhelmingly side with agencies. See William Eskridge & Lauren Baer, The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1142 (2008) (finding that the Supreme Court ruled for agencies in 91% of *Auer* cases); Richard Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 515, 519 (2011) (finding that district and circuit courts ruled for agencies in 76% of *Auer* cases) (last visited Oct. 11, 2014).

affording interested persons notice and an opportunity to comment." *Chrysler Corp.*, 441 U.S. at 316.

The Government argues that if an agency action that clarifies a regulation is an interpretive rule, then a later action that rescinds and replaces that rule must also be deemed an interpretive rule. The Government reasons that because the APA defines "rule making" as the "agency process for formulating, amending, or repealing" a rule, 5 U.S.C. § 551(5), the APA's procedural requirements must "apply equally to the process of formulating, amending, or repealing a particular rule, whether interpretive or otherwise." U.S. Br. 31.

But fundamentally different interests are implicated when an agency changes, rather than clarifies, a regulation's meaning. Precedent from the statutory context is illuminating. If a new law merely clarifies a law that preexisted a defendant's alleged violation, courts apply the new law retroactively. *See, e.g.*, *Piamba Cortes* v. *Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that "concerns about retroactive application are not implicated when an amendment * * * is deemed to clarify relevant law rather than effect a substantive change in the law").[4] The Due Process Clause, however, "protects the interests in fair notice and repose that may be compromised by retroactive legislation" if new law substantively changes old law. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). The same principles apply here.[5] When an agency conducts an about-face on a

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[4] See also *Brown* v. *Thompson*, 374 F.3d 253, 261 n.6 (4th Cir. 2004); *ABKCO Music, Inc.* v. *LaVere*, 217 F.3d 684, 691 (9th Cir. 2000) (same); *Liquilux Gas Corp.* v. *Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (same).

[5] This reading of 5 U.S.C. § 553(b) is further supported by the Court's practice of looking with suspicion at an agency interpretation that "conflicts with a prior interpretation * * *." *Christopher* v.

definitive regulatory interpretation, it must provide for notice and comment before it forces the public to likewise change course.

II. Regulation By "Interpretive Rule" Leads To Greater Public Costs And Uncertainty

These principles have real-life consequences for those, like *amici*'s members, who are subject to the power of federal regulatory agencies. Unchecked and irrational agency actions can upend millions of people's day-to-day lives. The following examples illustrate why the *Paralyzed Veterans* doctrine is essential to preventing improper diminution of the transparency, predictability, and accountability of the regulatory process.

A. The EPA's recent interpretive rule regarding agricultural conservation practices demonstrates the need for procedural regularity

One recent example of the potential dangers of overreaching interpretive rules comes in the agricultural context. The Environmental Protection Agency and the Army Corps of Engineers recently issued what they deemed an interpretive rule regarding certain exemptions available under the Clean Water Act. The Act requires any party seeking to discharge dredged or fill material into navigable waters to first obtain a permit—a process that requires notice and an opportunity for public hearings.[6] 33 U.S.C. § 1344(a). Congress amended the

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SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994)).

[6] This is no simple process. In *Rapanos* v. *United States*, a plurality of this Court declared that the Corps "exercises the discretion of an enlightened despot" when "deciding whether to grant or deny a permit" under section 1344(a). 547 U.S. 715, 721 (2006). The plurality noted that "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Ibid.*

Act in 1977 to exempt "normal farming, silviculture, and ranching activities" from this permitting requirement. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(f)(1), 91 Stat. 1566, 1600. The EPA and Army Corps of Engineers accordingly promulgated rules listing broad categories of normal farming activities that would not require permitting. See 40 C.F.R. § 232.3; 33 C.F.R. § 323.4.

On March 25, 2014, the EPA and Army Corps of Engineers issued a self-described "interpretive rule" that purported to "identif[y] additional activities considered exempt from permitting" while leaving exemptions in place for already-exempt activities. EPA & U.S. Dep't of the Army, Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) 1 (2014).[7] The rule first provided that activities named in the statute and regulations and "other activities of essentially the same character" were already exempt under existing regulations. *Id.* at 2. It then declared that "additional" exemptions for 55 specific Natural Resources Conservation Service (NRCS) agricultural conservation practices were warranted because these practices were "of essentially the same character" as the "upland soil and water conservation practices" named in the statute and regulations.[8] *Ibid.* But there was a catch: The 55 identified

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[7] *available at* http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf (last visited Oct. 15, 2014).

[8] The same day the agencies promulgated their interpretive rule, they issued a Memorandum of Understanding that listed the 55 agricultural conservation practices covered by the interpretive rule. See U.S. Dep't of Agric., EPA, & U.S. Dep't of the Army, Memorandum of Understanding Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards (2014), *available at* http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf (last visited Oct. 15, 2014).

practices would have to be performed in accordance with detailed technical standards promulgated by NRCS.[9]

The rule provides that it "does not affect, in any manner, the scope of * * * activities currently exempt from permitting under section 404(f)(1)(A)," *id.* at 1, but this cannot be true because the rule *necessarily* puts new restrictions on exempt activities. By the agencies' own reasoning, the 55 identified practices were already exempt. Why? These "exempt" practices were "of essentially the same character" as the "upland soil and water conservation practices" named in the statute and regulations. *Id.* at 2. What has changed is that now they "must * * * be implemented in conformance with NRCS technical standards." *Id.* at 4.

The rule, unsurprisingly, has generated confusion and costs for farmers. Day-to-day tasks like building fences, digging ditches, or pruning trees have been transformed overnight from simple farming activities into "NRCS Conservation Practices" with detailed practice standards.[10] Farmers who engage in these and similar routine

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[9] The NRCS offers conservation assistance to landowners who request it, but its conservation standards have always been voluntary "best practices," not regulatory requirements. See Natural Resources Conservation Services, Conservation Planning, *available at* http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/cp/ (last visited Oct. 15, 2014).

[10] For example, NRCS standards for building fences require: (1) fencing materials, type and design to be of a high quality and durability; (2) fences shall be designed, located, and installed to meet appropriate local wildlife and land management needs and requirements; (3) when appropriate, natural barriers should be utilized instead of fencing; (4) the fence design and location should consider erosion, flooding potential, and stream crossings; (5) fences across gullies, canyons, or streams may require special bracing, design, or approaches; and (6) regular inspection of fences as part of an ongoing maintenance program, including a schedule for inspections after storms, repair or replacement of loose materials, removal of

practices without a permit now run the risk of an enforcement action and thousands of dollars in fines if they are found out of compliance with NRCS standards. Thus, any farmer who plants a simple field border near navigable waters should be sure, among other things, to "[e]stablish plant species with morphological characteristics that optimize interception and adhesion of airborne particulates" and "produce adequate above- and below-ground biomass for the site" to "increase carbon storage."[11] Future editions of the Farmer's Almanac may need a huge regulatory appendix.

The failure to engage in proper notice-and-comment rulemaking not only imposes these burdens on farmers, but has generated unjustifiable confusion that could have been avoided.[12] Months after the rule was issued, it remained unclear which agency would enforce the new standards. On June 11, 2014, Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, testified to a congressional committee that the NRCS would be responsible for ensuring compliance.[13] The next week, Robert

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trees/limbs, replacement of water gaps, repair of eroded areas, and repair or replacement of markers or other safety and control features. See NRCS Conservation Practice Standard, Fence, Code 382 (2013) *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1144464.pdf (last visited Oct. 15, 2014).

[11] NRCS Conservation Practice Standard, Field Border, Code 386 (2013) *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1241318.pdf (last visited Oct. 15, 2014).

[12] While the agencies did allow the public to comment on this "interpretive rule," they did so only *after* the rule became binding on the public.

[13] Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Hearing Before the Subcomm. on Water Resources & Environment of the H. Comm. on Transportation and Infrastructure, 113th Cong. (2014) (Sec'y Darcy responding to Rep. Hahn) *available at* http://www.regulations.gov/contentStreamer?

Bonnie, who oversees the NRCS, testified to a different congressional committee that "there is no requirement that any landowner seek NRCS's certification for any of these practices,"[14] and "no requirement that there be any inspection that takes place."[15]

In July 2014, EPA Administrator Gina McCarthy admitted that when the EPA and Corps developed their interpretive rule, they did not anticipate a regulatory role for the Agriculture Department.[16] This concerned several affected parties because NRCS, the agency that developed the new conservation standards, is part of the Agriculture Department. McCarthy acknowledged that this was a "legitimate" concern the agencies "didn't anticipate."[17] She stated that the concern was raised in comments the agencies received *after* the interpretive rule went into effect.[18]

Administrator McCarthy's statements confirm the wisdom of the APA's procedural requirements and the *Paralyzed Veterans* doctrine. Before an agency issues a substantive rule, it must give notice and an opportunity to comment. The EPA and Corps' rule would have bene-

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objectId=0900064817948l4&disposition=attachment&contentType=pdf (last visited Oct. 15, 2014).

[14] A Review of the Interpretive Rule Regarding the Applicability of Clean Water Act Agricultural Exemptions: Hearing Before the Subcomm. on Conservation, Energy, and Forestry of the H. Comm. on Agric., 113th Cong. 17 (2014), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88485/pdf/CHRG-113hhrg88485.pdf (last visited Oct. 15, 2014).

[15] *Id.* at 28.

[16] Amena H. Saiyid, Bloomberg BNA, "McCarthy Says Agencies Didn't Anticipate Regulatory Role for USDA in Water Act Rule," July 9, 2014, *available at* http://www.bna.com/mccarthy-says-agencies-n17179891948/ (last visited Oct. 15, 2014).

[17] *Ibid.*

[18] *Ibid.*

fited if the agencies had given "the consideration that is the necessary and intended consequence of such procedures," and, had they done so, they "might have decided that a different accommodation was more appropriate." *Chrysler Corp.*, 441 U.S. at 316.

B. Sudden reversals by agencies create significant retroactivity concerns

The *Paralyzed Veterans* doctrine serves a limited but important role by preventing agencies from disguising wholesale changes in policy as mere "clarifications." This Court recently refused to defer to just such a late-breaking "clarification" that would have reversed decades of settled agency action and restructured an entire industry overnight. Farmers in the Ninth Circuit, however, have been less fortunate, and now face retroactive liability due to a similar agency reversal.

1. *The Department of Labor's "interpretive rule" in* Christopher *v.* SmithKline *would have unfairly upset significant reliance interests*

Opportunities for problems with interpretive rules appear to abound in labor law, the subject of this case. This Court recently rejected a Labor Department flip-flop that would have abruptly reversed decades of consistent agency practice and fundamentally altered the relationship between employers and over 90,000 employees. See *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012). The Fair Labor Standards Act (FLSA) imposes minimum wage and maximum hours requirements on employers, see 29 U.S.C. §§ 206-207, but those requirements do not apply to any employee working as an "outside salesman," § 213(a)(1). The issue in *SmithKline* was whether pharmaceutical sales representatives qualified as "outside salesm[e]n." 132 S. Ct. at 2161.

The FLSA did not define "outside salesman," but the Department of Labor defined the term in its regulation

and for decades gave the term a broad interpretation. In guidance provided in 1940 and 2004, the Department stated that the outside-salesman exemption could apply to employees who "in some sense" make sales. See Dep't of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 46 (1940); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (2004). The Department made clear that "[e]xempt status should not depend" on technicalities, such as "whether it is the sales employee or the customer who types the order into a computer system and hits the return button." 69 Fed. Reg. at 22163.

Since the 1950s, pharmaceutical companies have employed pharmaceutical representatives to provide information about their products to physicians. *SmithKline*, 132 S. Ct. at 2163-2164. The representatives encourage the physician to write more prescriptions when appropriate for the products they detail, but the representatives never transfer title to the product. *Id.* at 2163. For decades, pharmaceutical companies classified these employees as exempt outside salesmen. *Id.* at 2168.

The Department never suggested that this practice was unlawful, until 2009. Pharmaceutical representatives had brought class-action suits against their employers on the ground that plaintiffs were non-exempt employees who were owed years of unpaid overtime. *Id.* at 2164. In a 2009 Second Circuit *amicus* brief, the Department for the first time interpreted its regulation to state that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought." Br. for Sec'y of Labor as *Amicus Curiae* at 11, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010) (No. 09–0437). When the case reached this Court, the

Department took the position that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." Br. for United States as *Amicus Curiae* at 12-13, *SmithKline*, 132 S. Ct. 2156. The Department demanded *Auer* deference for its recent interpretive rule.

The Court declined to defer to the Department's interpretation because it contradicted the Department's apparent acceptance of the companies' actions. See *SmithKline*, 132 S. Ct at 2166-2167. The Court emphasized the serious reliance interests implicated by the Department's about-face, noting that "[u]ntil 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA." *Id.* at 2167. The agency's consistently broad interpretations of its regulation and years of inaction communicated the message that the companies' actions were lawful. *Id.* at 2167-2168. Were the Court to give deference to the agency's new interpretation, it would "frustrat[e] the notice and predictability purposes of rulemaking." *Id.* at 2168 (internal quotation omitted). The Court rejected the agency's unpersuasive interpretation and held that pharmaceutical representatives were outside salesmen under the FLSA. *Id.* at 2174.

Thus, like the courts that have followed the *Paralyzed Veterans* doctrine, this Court declined to give effect to a new "interpretive rule" that would have upended past agency interpretations and unfairly damaged parties who relied on those interpretations. A significant revision to a definitive interpretation may generate a unique sort of surprise when an agency offers it for the first time in litigation. But even when the regulatory U-turn occurs before litigation or an enforcement action, individuals and businesses that have invested their time and money in reliance on an agency's interpretation can still face life-

altering losses. Such surprises are still unfair and are not permitted under the APA.

2. *An agency about-face has exposed Nevada farmers to retroactive liability*

The sort of agency ambush that the Court rejected in *SmithKline* was recently blessed by the Ninth Circuit, where the *Paralyzed Veterans* doctrine does not apply. Department of Labor regulations require employers who hire temporary guest workers to reimburse those workers within the first workweek for expenses that are primarily for the benefit of the employer. See 29 C.F.R. §§ 531.3(d)(1), 531.35. For decades, the Department declined to bring enforcement actions against employers who did not reimburse temporary guest workers for the cost of traveling to the United States within the first workweek. A separate regulation instead required the employers to reimburse most of these expenses after 50% of an employee's work was completed. 20 C.F.R. § 655.122(h)(1). In 2008, the Department officially sanctioned this practice when it interpreted its regulation to clarify that such expenses were not primarily for the benefit of the employer. 73 Fed. Reg. 77,110, 77,149-50 (Dec. 18, 2008).

But three months and one election later, the agency reversed course, withdrawing its interpretation in March 2009, 74 Fed. Reg. 13,261 (Mar. 26, 2009), and issuing a contrary interpretation that August. DOL, Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* 1 (2009).[19] By 2011, Peri & Sons Farms, Inc., was a defendant in a class-action suit brought by former employees—many of whom had been hired before 2009—who alleged that Peri violated the FLSA when it failed to grant them travel reimburse-

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[19] *available at* http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm (last visited Oct. 15, 2014).

ments within their first week on the job. *Rivera* v. *Peri & Sons Farms, Inc.*, 805 F. Supp. 2d 1042, 1044 (D. Nev. 2011).

When the case reached the Ninth Circuit, the Department filed an *amicus* brief arguing that Peri was liable for failing to reimburse expenses in accordance with the agency's new interpretation, even for those expenses incurred before March 2009. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365). The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant * * *." *Id.* at 25. The Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. Under that approach—one hardly confined to this particular legal question—such "clarifications" could become increasingly common after every presidential election, concerns about legal stability and reliance interests notwithstanding.

C. Notice-and-comment rulemaking led OSHA to pass a more rational regulation and prevented the imposition of needless costs

The benefits to all parties of adhering to procedural regularity can be seen by comparing the before and after approach taken by the Occupational Safety and Health Administration (OSHA) when it decided to require employers to pay for their employees' personal protective equipment. After OSHA was rebuffed in its attempt to change its regulation through "interpretive rule," it engaged in notice-and-comment rulemaking to pass its new regulation. That process highlighted why regulations passed in accordance with the APA's requirements are more effective and less costly than regulations that circumvent these protections.

The Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, was enacted to promote safe on-the-job conditions for workers. Under the Act, OSHA promulgated a regulation requiring that wearable "personal protective equipment * * * shall be provided, used, and maintained * * *." 29 C.F.R. § 1910.132(a). The regulation did not specify whether employers were required to pay for this equipment.

In a 1974 agency adjudication, the Occupational Safety and Health Review Commission determined that "provide" in section 1910.132(a) did not mean "pay for." *Budd Co.*, 1 BNA OSHC 1548 (no. 74-1256, 1974), *aff'd*, 513 F.2d 201 (3d Cir. 1975). For more than a decade, OSHA never stated that the regulation required employers to pay for personal protective equipment. See *Union Tank Car Co.*, 18 BNA OSHC 1067, 1997 WL 658425, at *1-2 (No. 96-0563, 1997). In 1994, however, OSHA issued a memorandum that provided that employers were required to provide and pay for personal protective equipment, *id.* at *2, and a 1995 interpretive letter also stated that requirement, *id.* at *3.

In 1996, OSHA cited Union Tank Car Company for violating section 1910.132 because the company required its employees to purchase their safety shoes and gloves. *Id.* at *1. The company appealed the decision to the Occupational Safety and Health Review Commission, which refused to enforce the "new requirement contained" in the purported interpretive rule issued by OSHA. *Id.* at *3. "The Secretary's new interpretation comes after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*." *Ibid.*

Thus, instead of breaking with its past practice through a unilateral pronouncement, OSHA was forced to engage in notice and comment to amend its legislative rule. OSHA proposed an amended regulation that required employers to pay for all equipment except safety-

toe protective footwear and prescription safety eyewear that employees could safely use when off the job. Employer Payment For Personal Protective Equipment, 64 Fed. Reg. 15402 (proposed Mar. 31, 1999) (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918, 1926). The agency specifically requested input from regulated parties on a dozen issues. *Id.* at 15415-15416. OSHA received comments from numerous stakeholders who expressed concerns and shared insights regarding key provisions of the proposed rule.

OSHA responded to this input. For example, in its final rule, it expressly exempted certain items of clothing that it did not consider to be protective equipment, which was "particularly important because commenters to the rulemaking record identified a number of items that they thought would be subject to the rule and asked the Agency to clarify * * *." 72 Fed. Reg. 64342, 64346 (Nov. 15, 2007). OSHA clarified that while ordinary clothing like long sleeves, cotton gloves, and heavy coats could offer employees protection, such items were not protective equipment that employers had to cover under the statute or regulation. *Id.* at 64346-64347. Further, because "OSHA * * * determined that additional clarity was needed in the regulatory text regarding payment for everyday clothing and ordinary clothing used solely for protection from weather," it expressly exempted those items. *Id.* at 64349.

OSHA's proposed rule required employers to pay when personal protective equipment needed to "be replaced due to normal wear and tear or occasional loss." 64 Fed. Reg. at 15414. In response to comments, OSHA admitted that this language was "vague" and "unhelpful." 72 Fed. Reg. at 64355. It added new language that clarified this important issue. *Ibid.*

Following notice and comment, OSHA also admitted that it had included no provision to address employee-

owned personal protective equipment. *Id.* at 64358 Because commenters raised this issue, OSHA revised the final rule to "clearly set[] forth an employer's obligations with respect to employee-owned" equipment. *Ibid.*

Finally, OSHA recognized that small businesses and parties that had entered into collective bargaining agreements under the old regulation could face additional difficulties adjusting to the new rule. *Id.* at 64368. Accordingly, rather than implement the rule 90 days after finalizing it (much less overnight, as an "interpretive rule"), OSHA gave parties six months to prepare for this major change. The delay sought to "minimize the impact of the rule on existing collective bargaining agreements, and give businesses (including small businesses) needed time to implement the requirements." *Ibid.*

The process worked in the end. Because OSHA was prevented from sidestepping the APA's procedural requirements, it used notice and comment to amend its regulation. As Congress anticipated, the new regulation was better, clearer, and more effective for having gone through that process—something the agency itself acknowledged It also was more legitimate, because it created a record that would permit judicial review, and allowed the regulated public to participate in making that record. Had OSHA been allowed to short-circuit this process—as it initially wanted, and as the Government now wishes to authorize for all agencies—it would have amended its regulation through "interpretation," with the resulting uncertainty imposing significant and unjustifiable costs on employers and employees alike. Such results will be inevitable if the Court grants this power to the Government now.

* * *

Even under current law, agencies have repeatedly tried to slip past the APA's requirements by labeling ma-

jor regulatory changes as interpretive rules. If this Court were to do away with the *Paralyzed Veterans* doctrine, the incentives to regulate via "interpretive rule" would become irresistible in important regulatory fields, and likely in the areas that most justify transparency. Any number of settled regulatory regimes could be overturned instantly based on little more than the preferences of those then in power. The Court should not reopen the loophole closed by *Paralyzed Veterans*.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL., *Petitioners*,
v.
MORTGAGE BANKERS ASSOCIATION, *Respondent.*

JEROME NICKOLS, ET AL., *Petitioners*,
v.
MORTGAGE BANKERS ASSOCIATION, *Respondent.*

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

PAGE

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Courts must be able to distinguish true interpretive rules from those that are only labeled "interpretive" but are in fact legislative..... 5

II. When agencies use interpretive documents to make policy, they must comply with the same rulemaking requirements that apply to legislative rules. 9

A. Agencies use guidance to shape policy, and under current law, the courts are generally obliged to defer to the agencies' policy judgments. 10

B. Detrimental reliance on agency guidance is a persuasive indication that the guidance's interpretation has become part of a legislative rule..... 14

III. Allowing agencies to substantively change definitive interpretations without notice and comment will have significant adverse impacts on mining (and other highly-regulated industries), which rely on an open and fair process in agency decision-making..... 18

A. The mining industry is forced to rely heavily on interpretive documents due to broad and vague statutes, regulations, and rules 18

B. Because of its heavy reliance on agency guidance, the mining industry would be left especially vulnerable if agencies were allowed to change definitive interpretations without notice and comment. 22

IV. An agency that wants to reverse itself and dispense with notice and comment must also dispense with deference, justify its departure from the prior interpretation, and not apply the new interpretation retroactively. 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: **Page**

Alaska Prof'l Hunters Ass'n v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) 15

Alaska Trojan P'ship v. Gutierrez,
425 F.3d 620 (9th Cir. 2005) 27

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993) 3, 9

Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000) 8, 18

Ass'n of Am. R.R. v. Dep't of Transp.,
198 F.3d 944 (D.C. Cir. 1999) 15

Ass'n of Battery Recyclers, Inc. v. EPA,
208 F.3d 1047 (D.C. Cir. 2000) 3

Auer v. Robbins,
519 U.S. 452 (1997) 11

Barnhart v. Walton,
535 U.S. 212 (2002) 11

Barrick Goldstrike Mines Inc. v. Browner,
215 F.3d 45 (D.C. Cir. 2000) 3, 5

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780 F.2d 86 (D.C. Cir. 1986) 9

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 15, 16, 27

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 6

CropLife Am. v. EPA,
329 F.3d 876 (D.C. Cir. 2003) 6

Envtl. Integrity Project v. EPA,
425 F.3d 992 (D.C. Cir. 2005) 5

Gen. Elec. Co. v. EPA,
53 F.3d 1324 (D.C. Cir. 1995) 11, 28

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 15

Martin v. OSHRC,
499 U.S. 144 (1991) 11, 12

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 28

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 17

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 12

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490 U.S. 332 (1989) 11

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 6

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 11, 27

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372 F. Supp. 2d 1283 (N.D. Ala. 2005) 23

United States v. Ala. Power Co.,
681 F. Supp. 2d 1292 (N.D. Ala. 2008) 24

United States v. AMC Entm't, Inc.,
549 F.3d 760 (9th Cir. 2008) 28

United States v. Duke Energy Corp.,
278 F. Supp. 2d 619 (M.D.N.C. 2003) 23

United States v. Mead Corp.,
533 U.S. 218 (2001) 27

United States v. Ohio Edison Co.,
276 F. Supp. 2d 829 (S.D. Ohio 2003) 23

United States v. S. Ind. Gas & Elec. Co.,
245 F. Supp. 2d 994 (S.D. Ind. 2003) 24

Williams Natural Gas Co. v. FERC,
3 F.3d 1544 (D.C. Cir. 1993) 28

STATUTES:

5 U.S.C. § 551 *et seq.* 5

5 U.S.C. § 551(4) 5

5 U.S.C. § 551(5) 3, 5, 9

5 U.S.C. § 553(b)(A) 5

5 U.S.C. § 553(b)-(e) 5

5 U.S.C. § 704 6

30 U.S.C. § 42(a) 24

33 U.S.C. § 1319(c)-(d) 13

42 U.S.C. § 6928(d) 13

42 U.S.C. § 6928(g) 13

42 U.S.C. § 7413(b)-(c) 13

42 U.S.C. § 7475(a)(1) 22

42 U.S.C. § 7479(2)(C) 22

42 U.S.C. § 9603(b) 13

42 U.S.C. § 9609(c) 13

Pub. L. No. 106-113, 113 Stat. 1501 25

REGULATIONS AND RULES:

40 C.F.R. § 51.166(b)(2)(i) 23

40 C.F.R. § 51.166(b)(2)(iii) 23

40 C.F.R. § 261.4(b)(7) 19

40 C.F.R. § 261.4(b)(7)(i) 20

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INTEREST OF THE *AMICUS CURIAE*

The National Mining Association ("NMA")[1] is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state and local taxes each year.[2] A core mission of NMA is to work with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. NMA also participates in litigation raising issues of concern to the mining community.

The issue raised in this case—whether an agency can significantly modify its definitive interpretation of a rule without going through notice and comment rulemaking—has important implications for the mining industry. Mining is heavily regulated in numerous ways by a host of federal agencies, which prescribe rules governing issues from where mining may occur; to how mining facilities must be designed, operated and constructed; to how such facilities must be closed and reclaimed at the end of their operating life. Despite their complexity, these rules are

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[1] The National Mining Association states that (i) no counsel for a party authored this brief in whole or in part, and (ii) neither the parties, nor their counsel, nor anyone except the National Mining Association, its members, and its counsel financially contributed to preparing this brief. All parties have consented to the filing of this brief.

[2] National Mining Association, *The Economic Contributions of U.S. Mining (2012)*, at E-1 (2014), *available at* www.nma.org/pdf/economic_contributions.pdf.

frequently beset with vagueness and ambiguity—yet the penalties for less-than-perfect compliance can be substantial. And in disputes over the meaning of an agency regulation, the agency will assert that its own interpretation prevails, and the failure to accede to the agency's interpretation will be offered as evidence of willful violation carrying more severe penalties.

Mining companies therefore are effectively forced to comply with agency interpretations in order to carry out their operations, and they make highly consequential investment, business, and engineering decisions—such as whether and how to expand their operations—based on the rules as the agency has interpreted them. These interpretations can take many forms, including agency statements in preambles discussing the scope of a new rule; guidance documents fleshing out an agency's interpretation of a rule; and letters from authoritative agency personnel addressing the scope of the rule. In any form, these interpretations create significant investment-backed expectations on the part of mining companies and other regulated parties.

When an agency considers changing a settled interpretation through notice and comment, NMA regularly avails itself of the comment process to communicate the effect on its members' investment-backed expectations. But if petitioners prevail in this case, NMA's members will be triply damaged. First, the government will be free to change from one interpretation to another, and even to claim that the new interpretation is just as binding as the old one, despite the significant impact on the reasonable,

investment-backed expectations of regulated parties. Second, the voices of NMA and its members will not even be heard beforehand. Third, by labeling its revisions as changes in "interpretation," the agency may be able to insulate its new "interpretation" from timely judicial review.

For these reasons, NMA, its predecessors, and its members have regularly participated in litigation over agency interpretations—including many of the leading cases cited in the parties' briefs. *See, e.g.*, *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000); *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (intervenor); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993). The question presented here squarely implicates the interests of NMA and its member companies.

SUMMARY OF ARGUMENT

The Labor Department here, like federal agencies more broadly, wants to have it both ways. It wants the power to change what a rule means, without the notice and comment that the APA requires for "amending . . . a rule." 5 U.S.C. § 551(5).

In many cases involving "deference," the agency demands that the Judiciary respect the agency's broad substantive power to make federal law through interpretation: even when the federal courts would interpret an ambiguous federal regulation in one way, the agency asserts, the courts *must* adopt a different interpretation solely *because the agency prefers the latter interpretation*. Regulated parties, who often must comply with the law on pain of massive sanctions, cannot overcome that agency

interpretation: so long as the agency stays within certain fuzzily defined boundaries, the agency's view prevails. Moreover, such views are often insulated from judicial review until the agency pursues the regulated entity for a violation.

Now in this case, the government seeks to shrug off one of the few procedural constraints on its substantive authority to issue reinterpretations. The government seeks to make substantive changes without the modest requirement of notice and comment—even when regulated entities have relied on the previous interpretation in making business decisions and a reversal of that interpretation will upset settled, investment-backed expectations. The agency recognizes that there can be no such notice and comment exemption for substantive rules, so it comes to this Court claiming that its interpretations are not substantive at all—that they are just "interpretative," even though the agency has invoked and will continue to invoke them as effectively binding on the courts and regulated entities.

The issue in this case cannot be resolved simply by looking at what label the agency applies. An agency action is not exempted from notice and comment if it is, in substance, a change in the rule. Petitioners' contrary view, if adopted by this Court, could allow agencies to wreak havoc in a sector as heavily regulated as mining, in which decisions concerning what projects to undertake, and how to develop and operate them, are made based in part on long-standing agency regulatory interpretations.

ARGUMENT

I. Courts must be able to distinguish true interpretive rules from those that are only labeled "interpretive" but are in fact legislative.

One of the bedrock procedural protections of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, is that agencies may not engage in "rule making" without notice and comment. *Id.* § 553(b)–(e). "[R]ule making" includes "amending . . . a rule," and the APA's broad definition of a "rule" includes *any* "agency statement" with "future effect" that is "designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4), (5).

The only pertinent exception to the rulemaking requirement is the exception for purely "interpretative rules." *Id.* § 553(b)(A). That exemption creates an all-too-tempting pathway that agencies often seek to follow: rather than going through the time and expense of legislative rulemaking, agencies are more frequently expressing substantive policy though guidance documents.[3] Courts have readily recognized that some such interpretations are "interpretative" in name only.[4]

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[3] *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 167 (2000).

[4] *See, e.g. Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 47-49 (D.C. Cir. 2000) (recognizing that EPA's decision to use a guidance document, rather than notice-and-comment rulemaking, to announce that it would no longer apply EPCRA's de minimus exception to waste rock did not prevent it from creating "legal consequences" and "the prospect of hardship" to mining companies); *Envtl. Integrity Project v. EPA*,

The pathway bypassing notice and comment leads to a serious problem. The APA's *procedural constraints* on legislative rulemaking are designed to provide the public—especially the people being regulated—with fair warning of changes to the law, a chance to have input into those changes, and the opportunity to challenge those changes in court if they are arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 704 (legislative rules are subject to judicial review). The requirement to invite and consider public comment is "designed to assure due deliberation," *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), which in turn is essential to "informed administrative decisionmaking." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Public comment helps ensure that agencies have access to a range of viewpoints and expertise before making interpretations that significantly impact industries. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like —Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373 (1992) ("The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis.").

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425 F.3d 992, 997 (D.C. Cir. 2005) (holding that EPA's "flip-flop" interpretation of umbrella monitoring rules under the Clean Air Act "complies with the APA only if preceded by adequate notice and opportunity for public comment"); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (holding that EPA directive that created "dramatic change in the agency's established regulatory regime" required notice and comment).

Notice also often provides regulated entities with time—years, in some cases—to plan for compliance with the final rule. Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 124, 134-37 (1992) (reviewing data showing that major EPA rules took, on average, three years from the time the rule entered the agency's regulatory-development management system and the date the final rule was issued). This delay between notice and agency action "provides strong protection of reliance interests on current interpretations and policies." Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 337 (2011).

Finally, and most fundamentally, public participation through notice and comment can "instill[] a sense of legitimacy" and make the policy changes instituted by interpretive documents more democratic. Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702-03 (2007).

Using guidance documents to change the reach of regulations not only shuts out the public from having input into a change of course contemplated by an agency, it may also permit agencies to skirt centralized review by the Office of Management and Budget and its Office of Information and Regulatory Affairs ("OIRA"). *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (requiring that OIRA review proposed regulations). That review process plays a vital role in rulemaking by ensuring that each significant rule has undergone an independent analysis, "do[es] not conflict with the policies or actions of another agency," and has complied with

the requirements of a careful cost-benefit assessment. *See id.* §§ 6(a)(3)(B)-(C), 6(b), 7, 58 Fed. Reg. at 51741-42; James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 878-79 (2001). Moreover, public access to the analyses prepared during this review process, Exec. Order No. 12,866, § 6(b)(4)(D), 58 Fed. Reg. at 51743, also increases agency accountability and transparency. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2286–87 (2001). By contrast, the extent to which OIRA reviews guidance documents is "unclear" at best, and even in the relatively rare instances where that review does occur, there is a "significant question . . . whether the use of guidance documents might allow agencies to avoid [the] disciplining requirements," such as cost-benefit analysis, "that would otherwise have applied through the regulatory review process." Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 487, 489 (2014); *see id.* at 485-89.

Labeling a decision as interpretative in order to avoid notice and comment thus leads to agency policymaking that is less informed, less fair, and less democratically legitimate than Congress required in the APA. Given these serious ramifications, courts have correctly recognized that agencies may not insulate a legislative rule change from review by merely labeling it as an interpretative document. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive

legal addition to a rule a mere interpretation."); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986) (holding that an agency cannot escape judicial review under the APA by merely labeling its action as an "informal" guideline). What matters is the substance, not the label.

II. When agencies use interpretive documents to make policy, they must comply with the same rulemaking requirements that apply to legislative rules.

"[A]mending . . . a rule" is itself rulemaking. 5 U.S.C. § 551(5). If a rule contains an express exemption provision, for instance, there can be no doubt that deleting that exemption amounts to rulemaking, and requires notice and comment. Yet agencies regularly seek to bring out exactly the same effect using guidance instead of notice and comment. Under this Court's cases—enthusiastically embraced by the federal government—agency guidance can have real legal effects on the scope and meaning of a regulation, even if the guidance is not formally published in the *Code of Federal Regulations*. And for exactly that reason, regulated parties often have no choice but to rely on the agency's expressed view. Indeed, multimillion-dollar investments may be made in reliance on the agency's expressed view of what the law is.

If the interpretation announced in the guidance document has essentially become part of the rule—through deference by courts, reliance by regulated parties, or both—then it follows that *amending* the guidance document must follow the same procedure as amending the rule. *See Am. Mining Cong.*, 995

F.2d at 1112. But if the Court accepts petitioners' submission, federal agencies will be free to withdraw guidance at will—and then demand that the courts defer to the new interpretation just as they would have deferred to the old—without even a moment's advance notice to the affected parties. If this Court holds that the APA permits that course of action, the inevitable result will be more flip-flops. And because of deep reliance on agency guidance, many such reversals will be even more damaging to the regulated community than the reversal at issue here.

A. Agencies use guidance to shape policy, and under current law, the courts are generally obliged to defer to the agencies' policy judgments.

The government regularly employs guidance documents as "regulations lite": same great legal weight, no cumbersome notice and comment. By treating regulatory interpretations as binding sources of federal law, the government has defeated its own premise in this case—that adopting a different construction of a rule is not an amendment to that rule. Today, to win this case, the government asserts that interpretive rules are not binding. *See* Gov't Br. 30. But the government regularly sings a different tune, demanding that the courts defer to those supposedly non-binding interpretive rules. It has even done so in this very case.

The government has argued, and this Court has substantially agreed, that the issuance of agency guidance interpreting a federal regulation fundamentally transforms the task of a court interpreting that same regulation. Under those cases, once the agency has spoken, the court may no

longer seek the best reading of the regulation, under the ordinary rules of construction. Instead, this Court has held, "the agency's interpretation must be given '*controlling weight* unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (emphasis added); *accord, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("controlling"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Martin v. OSHRC*, 499 U.S. 144, 151 (1991) ("authoritative[]"). In short, the same federal government that today tells the Court that agency interpretations are harmlessly non-binding will tomorrow demand that the courts treat such interpretations *as binding*. And under current doctrine, the courts will generally agree, as long as the agency stays within the "considerable legal leeway" that *Auer* deference extends. *Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *see also, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328, 1330 (D.C. Cir. 1995) (court was required to defer to an agency interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations themselves] could not have fairly informed [regulated parties] of the agency's perspective").

The government has already done as much in this case. Respondent's original challenge included the contention that the Labor Department's 2010 interpretation was substantively invalid under the APA. The government successfully invoked *Auer* deference and urged the district court to dismiss that challenge: "Given that DOL's interpretation of its own regulations is entitled to 'controlling' deference,

this Court should reject [respondent's] argument to the contrary." Gov't Cross-Mot. to Dismiss or for Summ. J., 1:11-cv-73 ECF No. 15, at 36 (D.D.C. filed Mar. 10, 2011); *see also* Resp. Br. 8 (describing government amicus brief demanding "controlling deference" to the Labor Department's "substantive change").

Agency interpretation—and re-interpretation—is an exercise in policymaking. Indeed, that is a substantial part of this Court's rationale for deferring to agency interpretations: that it is the agency's "policymaking prerogative" to decide how its own regulation should apply. *Martin*, 499 U.S. at 151; *see id.* at 153 (agency's "policymaking expertise" justifies deference); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (deferring to the agency because its interpretation "entail[ed] the exercise of judgment grounded in policy concerns"). Recognizing the policy component is appropriate: agencies change their interpretations far too frequently to conceal their policymaking motivations.[5] That is especially true shortly before and after Inauguration Day, when revision of interpretative rules is considered a high priority.[6]

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[5] *See, e.g.*, Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1250 (2013) (regulated industries often experience "wild flip-flops" in an agency's position "during a short period of time").

[6] *See* Seidenfeld, *supra*, at 337 (noting that a change in administration can "prompt a change in the significance placed on costs of compliance or the benefits of a regulatory scheme" which encourages the agency to change interpretations); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889,

When a new administration replaces its predecessor's interpretation with a new, diametrically opposite one—as it did here, *see* Gov't Br. 4-6; Resp. Br. 6-8; Pet. App. 49a-84a—it cannot credibly claim to just be divining what the regulation has *always* meant. That would be revisionism just shy of "Oceania has always been at war with Eastasia."[7]

Given that *courts* must treat the agency interpretations as controlling, it follows that *regulated parties* must do the same. Indeed, failure to comply with federal regulations is often a criminal offense, subject to severe civil penalties, or both. *E.g.*, 33 U.S.C. § 1319(c)-(d) (Clean Water Act); 42 U.S.C. § 6928(d), (g) (Resource Conservation and Recovery Act); *id.* § 7413(b)-(c) (Clean Air Act); *id.* §§ 9603(b), 9609(c) (Comprehensive Environmental Response, Compensation, and Liability Act). The government often asserts that its interpretation provides the regulated community with fair notice of the meaning of a regulation, and failure to comply subjects the entity to enhanced penalties.

Interpretive guidance has a proper function—whether it is carried out in a preamble, agency guidance document, or a letter from an authoritative agency official—when it gives content to an ambiguous regulation, and purports to be the sort of authoritative statement of agency position that can

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953-54 (2008) (noting that agencies engage in much more regulatory activity in the last quarter of a president's term).

[7] *See* George Orwell, NINETEEN EIGHTY-FOUR 30 (Plume 1983) (1949).

receive deference.[8] That type of interpretation should properly be deemed part of the regulation for purposes of assessing compliance with the APA. This is not to say that promulgating the original interpretation necessarily requires notice and comment rulemaking. But once the interpretation has authoritatively fleshed out how the underlying rule shall apply in a particular context, a *change* in that prescribed application is a change in the rule. And a change in a rule requires notice and comment.

B. Detrimental reliance on agency guidance is a persuasive indication that the guidance's interpretation has become part of a legislative rule.

The court of appeals correctly recognized that substantial and justified reliance on an agency interpretation is one way (but not the only way) to show that the agency interpretation is the sort of definitive pronouncement that has, in substance, become part of the rule. *See* Pet. App. 6a, 9a. Regulated businesses do not rely upon—and invest substantial sums of money complying with—mere suggestions. *Id.* at 9a (observing that regulated entities are unlikely to "rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation"). Rather, they act in response to agency pronouncements that have the force of law. Indeed, agency pronouncements may *invite* reliance: an agency may issue guidance specifically to let regulated entities know how they

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[8] Some agency actions—for example, opinions of subordinate officials subject to internal agency review—plainly do not deserve deference and so can properly remain in the "interpretative" category. *See* Resp. Br. 19-20, 32.

should design, construct, and manage their operations.[9]

For that reason, courts applying the same principle as the decision below—that an interpretation may reflect substantive rulemaking, and thus need to be amended through notice and comment—have already recognized that reliance is an important factor for determining whether an interpretation is substantive. *See, e.g.*, *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035–36 (D.C. Cir. 1999) (holding that a well-established interpretation upon which the affected parties had substantial and justifiable reliance required notice and comment before it could be changed); *Ass'n of Am. R.R. v. Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999) (noting likelihood that an interpretation is substantive rather than interpretive when the company "altered their business practices in any significant manner" or "made large capital expenditures based on [the agency's] interpretation").

Using interpretive documents to change the rule of decision applied in court (based on deference), and thus to deprive regulated entities of their justifiable, investment-backed expectations, amounts to the same type of "unfair surprise" this Court has found invalid. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012); *see also Long Island Care at Home, Ltd. v. Coke*, 551

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[9] *See, e.g.*, Letter from Elizabeth Cotsworth, Acting Director, EPA Office of Solid Waste, to Steven Barringer and Michael Giannotto (Dec. 2, 1998), *available at* http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/3aa2ed713ebbab8d852569c900623ed3!OpenDocument.

U.S. 158, 170 (2007) (deferring to the Secretary of Labor's changed position in part because the Secretary had gone through notice and comment, which mitigated any "unfair surprise"). In *Christopher*, this Court recognized the "potential for unfair surprise" when the Labor Department's "announcement of its interpretation [wa]s preceded by a very lengthy period of conspicuous inaction" and "there was no [notice or] opportunity for public comment." *Christopher*, 132 S. Ct. at 2168-69. Expressing concern that the agency's new policy would suddenly expose companies to "potentially massive liability . . . for conduct that occurred well before that interpretation was announced," this Court declined to defer to the agency's interpretation because it "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Id.* at 2167 (internal quotation omitted).

This Court in *Christopher* concluded that serious measures were warranted—denial of deference and rejection of an agency interpretation—when the Secretary of Labor sought to switch from a position of silence to a position of substance. The Court recognized that a regulated party can justifiably rely on agency *in*action. Here the remedy the regulated party seeks is much more modest: the D.C. Circuit recognized that the agency was "free to" adopt its preferred new interpretation, so long as it goes through notice and comment first. Pet. App. 3a. And the government's reversal of position is even more significant from the perspective of regulated parties: the public surely is even more justified in relying on actual agency *guidance* than on mere agency *silence*, as in *Christopher*. The risk of "unfair surprise"

identified in *Christopher* is correspondingly greater where, as here, an agency uses an interpretive document to change a prior legislative rule.

Indeed, this Court has already recognized that justifiable reliance may limit an agency's ability to change interpretations without notice and comment. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court balanced an agency's interest in changing a long-standing interpretation in an adjudicative proceeding against the adverse consequences to reliance interests before ultimately concluding that "the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding." *Id.* at 294-95.

The D.C. Circuit's *Paralyzed Veterans* rule rightly applies the exact same reliance-based logic to the situation currently before the Court. As the court recognized, "significant reliance functions as a rough proxy" for definitive interpretations while "[a]gency pronouncements effectively ignored by regulated entities are unlikely to bear the marks of an authoritative decision." Pet. App. 9a (explaining *Paralyzed Veterans* doctrine). In sum, reliance frequently will serve as the best evidence that an agency's interpretation is a definitive one.

III. Allowing agencies to substantively change definitive interpretations without notice and comment will have significant adverse impacts on mining (and other highly-regulated industries), which rely on an open and fair process in agency decision-making.

A. The mining industry is forced to rely heavily on interpretive documents due to broad and vague statutes, regulations, and rules.

Mining and other regulated industries are often forced to rely on so-called "interpretive" documents. Courts have recognized this predicament:

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Appalachian Power Co., 208 F.3d at 1020.

The Environmental Protection Agency (EPA) regularly issues guidance documents, regulatory preambles, and correspondence construing how the

Resource Conservation and Recovery Act ("RCRA"),[10] the Clean Water Act ("CWA"),[11] and the Emergency Planning and Community Right-to-Know Act ("EPCRA")[12] apply to the mining industry. While ostensibly "interpretive," in practice mining companies must often treat them as more than mere suggestions.

To cite one example, EPA by regulation exempts from RCRA's hazardous-waste provisions all wastes "uniquely associated" with mineral "beneficiation" and 20 specific (but not all) mineral "processing" wastes. 40 C.F.R. § 261.4(b)(7). In designing, constructing and operating their facilities, mining companies need to know whether particular waste streams will, in fact, be categorized as "uniquely associated" with "beneficiation" by EPA (and therefore categorically exempt from RCRA

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[10] *E.g.*, EPA, Office of Solid Waste, *Final Technical Background Document: Identification and Description of Mineral Processing Sectors and Waste Streams* (Apr. 1998) ("1998 Technical Background Document"), *available at* http://www.epa.gov/epawaste/nonhaz/industrial/special/mineral/pdfs/techdocs.htm.

[11] *E.g.*, EPA, Office of Water, *Development Document for Effluent Limitations Guidelines and Standards for the Nonferrous Metals Manufacturing Point Source Category Volume I General Description* (1989), *available at* http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyPDF.cgi/00001D1C.PDF?Dockey=00001D1C.pdf; EPA, Office of Water, *Development Document for Effluent Limitations Guidelines and Standards for the Ore Mining and Dressing Point Source Category* (1982), *available at* http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyPDF.cgi/00003BTW.PDF?Dockey=00003BTW.pdf.

[12] *E.g.*, EPA, Office of Pollution Prevention and Toxics, *EPCRA Section 313 Industry Guidance: Metal Mining Facilities* (Jan. 1999), *available at* http://www2.epa.gov/toxics-release-inventory-tri-program/guidance-metal-mining-facilities.

regulation) or instead as "mineral processing" (and therefore subject to regulation unless specifically listed as one of 20 exempt mineral processing wastes). While EPA's regulations contain a definition for the term "beneficiation," *see id.* § 261.4(b)(7)(i), they do not define "mineral processing," and in fact EPA has recognized that the exact parameters of "beneficiation," and the precise line between "beneficiation" and "mineral processing" are often unclear. *See Methods and Data Sources*, 1998 Technical Background Document, *supra* note 10, at 23 ("Defining which operations are beneficiation and which (if any) are processing [at a particular facility] can be a complex undertaking"); *id.* at 24 ("[Some] mineral industry activities are more difficult to classify unambiguously as beneficiation operations [because] [c]ertain beneficiation activities may bear a close resemblance to certain mineral processing operations.").

To clarify the reach of its regulations, the EPA has over the past three decades provided guidance on these issues to States and regulated entities in the form of statements in preambles, guidance letters, and guidance documents. For instance, in 1998, after notice and comment, the EPA issued a massive 900-page "Technical Background Document" that painstakingly discusses each hardrock mineral industry sector and sets forth the Agency's views on which waste streams in those sectors are "uniquely associated" with "beneficiation" (and therefore exempt from RCRA) and which are "mineral processing" wastes or wastes that are not "uniquely associated" with beneficiation (and therefore not exempt). 1998 Technical Background Document,

supra note 10. Regulated entities have relied on this document's characterization of certain wastes as exempt "beneficiation" wastes when designing and constructing hundred-million-dollar facilities, and in operating those facilities.

Any significant change to the portions of this Technical Background Document on which mining companies have relied, particularly any change under which a waste long deemed an exempt "beneficiation" waste would now suddenly be transformed into a non-exempt "mineral processing" waste, could have significant adverse impacts on the mining industry. Multi-million-dollar facilities might need to be shut down and extensively retrofitted and new facilities built to manage previously exempt wastes as "hazardous waste." Such a change in the status of a regulated waste, and in all of the prior preambles, letters, and guidance documents on which that status is based, would in substance be changing the regulations. That constitutes a rulemaking requiring notice and comment. If the agency proceeded with the amendment following notice and comment, mining companies would then have had an opportunity to express their opinions on any change, including the great reliance interests that they have in the existing system, and the opportunity to obtain judicial review of the changes before they are threatened with penalties for violating them.

This is but one example of the many agency opinions and guidance documents that govern the manner in which mining facilities are planned and exist. Changes would not merely affect how mining

companies could operate going forward. They also could potentially result in mining companies' having to retrofit or even mothball existing facilities that were designed and constructed in reliance on the prior agency guidance and interpretive rules.

B. Because of its heavy reliance on agency guidance, the mining industry would be left especially vulnerable if agencies were allowed to change definitive interpretations without notice and comment.

The mining industry is understandably concerned about the sort of multi-million-dollar agency flip-flop discussed above, especially since retrofitting a single mine to comply with new regulations can cost $150 million. *See, e.g.*, MINING AND THE ENVIRONMENT: INTERNATIONAL PERSPECTIVES ON PUBLIC POLICY 154 (Roderick Eggert ed., 2011) (citing Bureau of Mines, Annual Report 28 (1990)). The industry's experience has made clear just how necessary it is to restrain agencies from surprise reversals.

After making significant investments in reliance on definitive guidance documents, the mining industry has been repeatedly subjected to sudden changes in agency interpretation, with significant consequences. A prime example is the EPA's revision of its interpretation of the Clean Air Act's ("CAA") "routine maintenance, repair, and replacement" ("RMRR") exemption without notice or the opportunity to comment. The Prevention of Significant Deterioration ("PSD") provisions of the CAA require operators of regulated sources in attainment areas to obtain a permit before modifying

a facility. 42 U.S.C. §§ 7475(a)(1), 7479(2)(C). EPA regulations provide that RMRR is not a "modification" and therefore does not require a PSD permit. 40 C.F.R. § 51.166(b)(2)(i), (iii). Consistent with statements in a 1992 preamble, the EPA interpreted this RMRR exemption as applying to activities that were "routine" *according to industry practice*. 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (noting that "the determination of whether the repair or replacement of a particular item of equipment is 'routine' . . . must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category"). This standard was the unquestioned law.[13]

But suddenly the EPA changed its interpretation. In a series of enforcement actions, the EPA argued for—and sought deference to—a conflicting interpretation that the RMRR exemption was based on whether an activity was routinely performed at a *particular facility*. *E.g.*, *Duke Energy*, 278 F. Supp. 2d at 630, 635 (observing that the EPA's interpretation that "the RMRR exemption requires 'a case-by-case determination of whether the activity is routinely performed at an individual unit'" conflicted with previous guidance) (quoting an EPA

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[13] *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 637 (M.D.N.C. 2003) ("*Duke Energy*") ("Through the EPA's statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades the EPA . . . established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry.").

pleading).[14] Through a self-serving litigation position, the EPA purported to change the law without notice or opportunity to comment while seeking to penalize those not clairvoyant enough to foresee its reversal.[15] As a result, companies that had undertaken what they thought was routine maintenance in reliance on the prior interpretation faced the prospect that they had accidentally run afoul of the PSD provisions and risked substantial fines and legal costs.

The EPA is not the only agency whose abrupt changes in legal interpretation have threatened the mining industry with the loss of multi-million-dollar investments. Under the General Mining Law of 1872, the holder of a mining claim has a right to locate and utilize "millsites" on public land for ancillary activity related to mining so long as "no [millsite land] * * * shall exceed five acres." 30 U.S.C. § 42(a). For 125 years, this requirement had consistently been interpreted as not imposing any limits on the number of millsites per mining claim. *E.g.*, BLM Manual, Rel. 3-270, 3864-Mill Site Claim Patent Applications (July 9, 1991); *see generally* Patrick Garver & Mark Squillace, *Mining Law*

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[14] *See also United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1290 (N.D. Ala. 2005) (noting that the EPA changed its interpretation of the RMRR); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 844–45 (S.D. Ohio 2003) (granting deference to the EPA's interpretation that "routine" must be judged in reference to the unit and not the industrial category); *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1007–10 (S.D. Ind. 2003) (same).

[15] *See United States v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1311 (N.D. Ala. 2008) (observing that applying the EPA's new interpretation to a modification that occurred while the previous one was in effect "strikes the court as a 'gotcha' test.").

Reform—Administrative Style, 45 ROCKY MTN. L. INST. §§ 14.01-14.07 (1999). Mining companies relied on this interpretation in determining whether to invest hundreds of millions of dollars into planning and designing mining facilities and seeking the Interior Department's approval to operate those facilities.

Despite the deep reliance on the longstanding interpretation, in 1997, the Solicitor of the Interior, John Leshy, sought to reverse it. He issued an opinion declaring that "only one millsite of no more than five acres" may be located with each mining claim. Solicitor's Opinion M-36988, Limitations on Patenting Millsites Under the Mining Law of 1872, at 2 (Nov. 7, 1997). This abrupt change in policy threatened to wipe out substantial investment in existing and prospective hard rock mining operations on the public lands. According to the opinion, many mining companies were now illegally operating on federal land. Unsurprisingly, stock in the mining industry plummeted. *Crown Jewel Mine Decision: Hearing Before the S. Subcomm. on Forests & Pub. Land Mgmt. of the Comm. on Energy and Natural Res.*, 106th Cong. 60 (1999) (statement of Danny E. Robertson, Operations Manager, Crown Jewel Mine, Battle Mountain Gold Co.). Most significantly, Solicitor Leshy used his Opinion as the basis for declining final approval of a proposed gold mine – after the mining company had already spent $80 million in development investments in reliance on the prior long-standing interpretation. *Id.* at 4 (statement of Sen. Harry Reid); Marc Humphries, Congressional Research Service Report for Congress, *The Mining Law Millsite Debate* (Sept. 14, 1999).

Fortunately, Congressional action[16] and a change in administration[17] prevented most of these harms from coming to fruition.

NMA's experience has been harsh, but it has not been unique. The foregoing examples highlight the need for courts to be able to scrutinize agency action to prevent regulating authorities from smuggling substantive change under the guise of guidance to the detriment of industries that reasonably relied on prior interpretations.

IV. An agency that wants to reverse itself and dispense with notice and comment must also abandon any claim to deference, justify its departure from the prior interpretation, and refrain from applying the new interpretation retroactively.

At the very least, if a federal agency wants the freedom from notice and comment requirements that applies to interpretative rules, it must treat its new action as truly "interpretative." To reverse the interpretation of guidance that is effectively binding under *Auer*, without notice and comment, it must abjure reliance on *Auer* in defending the new guidance. It must also be required to explain the

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[16] Interior and Related Agencies Appropriations Act for FY2000, Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (barring enforcement of Solicitor Leshy's millsite opinion).

[17] Deputy Solicitor's Opinion M-37010, Mill Site Location and Patenting under the 1872 Mining Law, at 2 (Oct. 7, 2003) (retracting Solicitor Leshy's opinion while noting that it had "represented a departure from the Department's long-standing administrative practice and interpretation that the mill site provision does not limit mill sites to one per mining claim").

change in circumstances that justifies its new interpretation of an unchanged regulation. And it must rigorously refrain from applying the new interpretation to upset settled expectations. In short, the agency must take the bitter with the sweet. Adopting such a construction of "interpretative rule" would at least ensure that, when an interpretation is reversed without notice and comment, the new interpretation is one that the courts and the agency can agree is the best interpretation, not just a permissible one, and that regulated entities are not punished for relying on the old interpretation.

This Court has already laid the groundwork for such a rule. In a number of cases, the Court has suggested that agencies may not claim deference to an interpretation that is contrary to the agency's own "intent at the time of the regulation's promulgation," *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted), shown through objective "indications" such as a regulation's preamble. *See, e.g.*, *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 631-33 (9th Cir. 2005). And more generally, the Court has stated that "considerably less deference" is due "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation." *Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation omitted); *see Christopher*, 132 S. Ct. at 2166-67. In cases of agency reversal through guidance, given the lack of procedural protections, there should be no deference: the new interpretation should stand on its own merits, to the extent it has the power to persuade. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 233, 234-35 (2001) (agency interpretations not undertaken pursuant to notice and comment receive

only *Skidmore* respect, rather than *Chevron* deference).

Furthermore, the new interpretation must truly be an interpretation, not policymaking in disguise. The agency therefore must explain the change as based on something more than new decision-makers. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 37-38, 57 (1983) (holding that an agency failed to present an adequate basis and explanation for rescinding a regulation after a change in administration).

An agency's new interpretation must also comply with due process limits. Courts of appeals have relied on due process to preclude a federal agency from imposing penalties for failure to comply with a regulatory interpretation *announced after the supposed offense*, unless the regulated community had constitutionally adequate notice of what the regulations meant. *See, e.g., Gen. Elec. Co.*, 53 F.3d at 1329-31; *see also Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (noting that "it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule"). Those cases involved interpretation, not *re*-interpretation. It follows *a fortiori* that a regulated party cannot be subject to penalties for failure to predict an agency's flip-flop: reliance on the agency's own binding, authoritative interpretation *at a minimum* excuses any culpability. No one can constitutionally be punished for failing to read the regulation to mean X when the responsible federal agency maintained at the time that it meant Y.

The new interpretation also should not be allowed to be applied so as to require retrofitting of existing facilities designed and constructed in reliance on the old interpretation. *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 762 (9th Cir. 2008) (reversing injunction requiring "modifications to multiplexes that were designed or built before the government gave fair notice of its [new] interpretation of" regulation imposing line-of-sight requirement). Even if agencies have the power to reinterpret their regulations, they certainly lack the Orwellian power to reinterpret them *retroactively*.

The government cannot both take interpretive power away from the courts *and* take the protections of notice and comment away from the regulated community. If a government seeks to change a binding interpretation that has become part of a rule, it must follow the procedures to amend the rule—or else abandon any claim that its new interpretation will be binding on the courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

In The
Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF THE DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* QUICKEN LOANS INC. IN SUPPORT OF RESPONDENT MORTGAGE BANKERS ASSOCIATION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE* QUICKEN LOANS INC.	1
STATEMENT OF THE CASE	2
A. Quicken Loans	3
B. Quicken Loans' Mortgage Bankers Are Exempt From the FLSA's Overtime Requirements	4
C. Intervenors' Counsel Files Multiple Lawsuits Against Quicken Loans Attacking the Exempt Classification of Its Mortgage Bankers	8
D. The DOL Issues AI 2010-1	11
E. The Havoc Wreaked by the DOL's AI 2010-1	12
SUMMARY OF THE ARGUMENT	16
ARGUMENT	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).....19

Am. Fed'n of Gov't Emps., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981).....18

Biggs v. Quicken Loans, Inc., No. 2:10-cv-11928 (E.D. Mich.).....10, 12, 13

Chasteen v. Rock Financial, No. 2:07-cv-10558 (E.D. Mich.).....9, 10

Henry v. Quicken Loans, Inc., 698 F.3d 897 (6th Cir. 2012).....10

Henry v. Quicken Loans, Inc., No. 2:04-cv-40346 (E.D. Mich.).....*passim*

Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250 (D.C. Cir. 2005).....18

Mathis v. Quicken Loans, Inc., No. 2:07-cv-10981 (E.D. Mich.).....9, 10

Mortg. Bankers Ass'n v. Solis, No. 12-5246 (D.C. Cir.).....11

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).....18

Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997).....2, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551-559 ..... *passim*

5 U.S.C. § 551(4) 17

5 U.S.C. § 551(5) 17

5 U.S.C. § 553 17

5 U.S.C. § 553(b) 17

5 U.S.C. § 553(c) 17

5 U.S.C. § 553(d) 18

Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ..... 2, 4, 5, 13, 16

29 U.S.C. § 213(a)(1) 4

Portal-to-Portal Act, 29 U.S.C. § 259 ..... 1, 2, 9

29 U.S.C. § 259(a) 2

RULES AND REGULATIONS

29 C.F.R. § 541.203(b) 7

OTHER AUTHORITIES

Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) 7

TABLE OF AUTHORITIES – Continued

Page

Department of Labor's Administrator's Interpretation No. 2010-1 (Mar. 24, 2010) .....*passim*

Department of Labor's Wage and Hour Opinion Letter, FLSA2006-31 (Sept. 8, 2006).....*passim*

Executive Order No. 12866, 58 Fed. Reg. 51735, 1993 WL 388305 (Sept. 30, 1993).....17

Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909).....19

INTEREST OF *AMICUS CURIAE* QUICKEN LOANS INC.

Quicken Loans Inc. ("Quicken Loans") respectfully submits this brief as *amicus curiae* in support of Respondent Mortgage Bankers Association because Quicken Loans has an interest in the outcome of this case.[1]

Former Quicken Loans mortgage bankers are attempting to use the Department of Labor's (the "DOL") Administrator's Interpretation No. 2010-1 (Mar. 24, 2010) ("AI 2010-1"), which "represents a substantive change in the Department's interpretation of its administrative exemption regulations" (*Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 27-28), to impose immediate overtime liability on Quicken Loans where none existed. No liability existed because, as a matter of law, Quicken Loans acted in good faith under Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 ("Section

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[1] No counsel for a party in this case authored Quicken Loans' *amicus curiae* brief in whole or in part. No counsel or party in this case made a monetary contribution intended to fund the preparation or submission of Quicken Loans' *amicus curiae* brief. Sup. Ct. R. 37.6. Respondent Mortgage Bankers Association and Petitioners-Intervenors Jerome Nickols, Ryan Henry, and Beverly Buck filed blanket consents with the Court allowing for the filing of *amicus* briefs. Federal Petitioners, Thomas E. Perez, Secretary of Labor, the Department of Labor, and David Weil, Administrator, Wage and Hour Division, consented to the filing of Quicken Loans' *amicus* brief on October 14, 2014.

259"), in relying on the DOL's Wage and Hour Opinion Letter, FLSA2006-31 (Sept. 8, 2006) (the "2006 Opinion Letter") finding mortgage bankers are exempt employees.[2] The DOL and Intervenors' position is that the only way Quicken Loans could have avoided liability after AI 2010-1 was to implement wide-sweeping changes to its longstanding operations, policies, and procedures – ***overnight***. This simply was impossible. The DOL's abrupt and substantive change violates the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551-559. The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

STATEMENT OF THE CASE

The Mortgage Bankers Association's Consolidated Brief ("MBA Brief") provides historical context relating to the DOL's definitive interpretations of the FLSA's administrative exemption regulations. MBA Br., pp. 2-8. The MBA Brief also fully analyzes the APA, the *Paralyzed Veterans* doctrine (*Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C.

[2] Pursuant to Section 259, an employer is subject to no liability under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, where it "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage & Hour Division of the DOL]." 29 U.S.C. § 259(a).

Cir. 1997)), and the vital importance of protecting the reliance interests of, and ensuring procedural fairness to, regulated entities. *Id.*, pp. 16-51. Quicken Loans files this brief as *amicus curiae* in support of Respondent Mortgage Bankers Association to provide further context and perspective regarding the DOL's failure to comply with the APA's notice-and-comment rulemaking procedures when it issued AI 2010-1.

A. Quicken Loans

Founded in 1985, Quicken Loans is a mortgage banking financial institution that originates residential mortgage loans in all 50 states and then processes and closes loans.[3] *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 715, p. 38; *id.*, ECF No. 720, pp. 138, 172; *id.*, ECF No. 735, p. 165. Over the course of many years, Quicken Loans has employed thousands of mortgage bankers to provide financial services to its clients. *See Quicken Loans History – Quicken Loans Press Room*, QUICKEN LOANS INC. (Oct.

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[3] Quicken Loans routinely has been recognized as an outstanding employer and for the exceptional financial services it provides to its clients. Most recently, Quicken Loans was rated the number one company in customer satisfaction by J.D. Power and among the top five companies to work for in the nation. *2013 Primary Mortgage Origination Study – Quicken Loans*, J.D. POWER (Oct. 15, 2014, 4:00 PM), http://www.jdpower.com/award/2013-primary-mortgage-origination-study-quicken-loans; *Quicken Loans – Best Companies to Work for 2014*, FORTUNE (Oct. 15, 2014, 4:00 PM), http://fortune.com/best-companies/quicken-loans-5/?iid=BC14_lp_header.

15, 2014, 4:00 PM), http://www.quickenloans.com/press-room/fast-facts/ql-history/. When the DOL issued AI 2010-1 on March 24, 2010, Quicken Loans employed more than 1,500 mortgage bankers primarily in offices in Detroit, Michigan, Cleveland, Ohio, and Scottsdale, Arizona. *See Fast Facts – Quicken Loans Pressroom*, QUICKEN LOANS INC. (Oct. 15, 2014, 4:00 PM), http://www.quickenloans.com/press-room/fast-facts/.

B. Quicken Loans' Mortgage Bankers Are Exempt From the FLSA's Overtime Requirements

Throughout the years, Quicken Loans operated its business based on the exempt classification of its mortgage bankers pursuant to the FLSA's administrative exemption. 29 U.S.C. § 213(a)(1). Quicken Loans viewed its mortgage bankers as exempt financial services professionals who made significant judgments, used their own discretion, managed their interactions with clients, and structured their own workload and workday. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7; *see also id.*, ECF No. 720, p. 26; *id.*, ECF No. 733, p. 63; *id.*, ECF No. 734, pp. 39-40, 143-44. Quicken Loans did not, and had no reason to, closely monitor or track its mortgage bankers' work hours. *Id.*, ECF No. 720, p. 59.

After Quicken Loans determined that the FLSA's administrative exemption applied to its mortgage bankers, Quicken Loans developed a compensation structure that was more favorable to its employees

than if overtime compensation had been paid. *Id.*, pp. 83-84. Quicken Loans' mortgage bankers received a guaranteed base salary with the opportunity to earn substantial commissions. *See, e.g., id.*, ECF No. 716, pp. 124-25; *id.*, ECF No. 722, p. 84. Mortgage bankers also received a comprehensive benefits package commensurate with financial services employees. *See, e.g., id.*, ECF No. 714, pp. 17-19; *id.*, ECF No. 716, p. 133; *id.*, ECF No. 719, p. 61; *id.*, ECF No. 720, p. 84; *id.*, ECF No. 722, p. 82. Many of Quicken Loans' mortgage bankers earned more than $100,000 per year under its generous compensation system. *Id.*, ECF No. 720, p. 158.

Quicken Loans' decision to classify its mortgage bankers as exempt was not imprudent. It was the result of years of thorough and reasoned analysis and constant consideration of relevant authority by its Vice President of Administration, David Carroll, who also is a lawyer by training. In making his classification decision of web mortgage bankers (and maintaining it after periodic reviews), Carroll relied on a number of sources, including: (1) "federal regulations defining the FLSA white-collar exemptions (including the versions in effect both before and after August 23, 2004)"; (2) "the relevant opinion letters of the U.S. Department of Labor . . . addressing the scope and application of those regulations"; (3) "relevant federal case law"; (4) his "periodic review of the Company's compensation policies and practices [and] mortgage

bankers' job duties"; and (5) the exempt status of similar occupations.[4] *Id.*, ECF No. 436-7, p. 4; *see also id.*, ECF No. 436-6, pp. 62-69. Carroll confirmed his understanding of these sources with in-house and outside legal counsel. *See id.*, ECF No. 436-6, p. 104.

Carroll reevaluated and reaffirmed his classification decision on several occasions, taking into account the exempt status of similar occupations and relevant legal developments. *Id.*, pp. 62-69.[5] When the DOL proposed regulations in March 2003, like any prudent employer would do, Carroll considered them. "[T]hey confirmed [his] understanding that employees may be exempt if they perform services for the clients of their

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[4] *See id.*, ECF No. 436-7, p. 4 (noting that Carroll "compared the job duties of mortgage bankers with those of other financial services professionals, including stockbrokers").

[5] Carroll even "carefully stud[ied]" opinions by subordinate DOL employees, finding in his "reasoned estimation" that Quicken Loans' mortgage bankers were readily distinguishable from the loan officers described in those letters. *Id.*, ECF No. 436-7, p. 5. Specifically, he studied a 1999 letter by a subordinate DOL employee that concluded, based on the limited facts before the DOL at that time, the subject loan officers did not satisfy either the "primary duty" or the "discretion and independent judgment" tests of the administrative exemption. *See id.* He also studied a 2001 letter by another subordinate DOL employee, which was issued in response to a request for reconsideration of the 1999 opinion. *See id.* The 2001 letter modified the earlier letter, finding that the hypothetical loan officers satisfied the primary duty test. The 2001 letter still maintained, however, that the subject loan officers did not exercise discretion and independent judgment and were therefore non-exempt. *See id.*

employer, which mortgage bankers do." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 6.

When the DOL promulgated its final regulations in April 2004 (analyzed in the MBA Brief at pages 3-5), he "examin[ed]" them, including the "financial services" provision at 29 C.F.R. § 541.203(b), which "further solidified [his] earlier conclusion that the FLSA administrative exemption was all along the correct classification for [Quicken Loans'] mortgage bankers." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, pp. 6-7. Carroll "took particular note" of the preamble to the 2004 regulations,[6] and its recognition that "some selling to consumers" would not defeat application of the administrative exemption to "financial services" employees. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 7.

Carroll "revisit[ed his] classification decision" following the DOL's issuance of the 2006 Opinion Letter on September 8, 2006, which he became aware of "immediately after it was released." *Id.* The 2006 Opinion Letter (described in the MBA Brief at pages 5-6) found that mortgage bankers satisfy the administrative exemption. *See generally* 2006 Opinion Letter. He "closely reviewed the 2006 DOL Letter and compared its description of the job duties of the

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[6] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22,122, 22,146 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

'mortgage loan officers' . . . with the job duties of [Quicken Loans'] mortgage bankers," determining that they were "substantially the same." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 7. Accordingly, Carroll concluded that "[Quicken Loans] should maintain the exempt classification for [its] mortgage bankers." *Id.* According to Carroll, "[n]ot only did the 2006 DOL Letter not contradict [his] decision to use the exempt administrative classification, it made it absolutely clear that the exempt classification was the right call all along." *Id.*, p. 8.

Carroll made the classification decision "based on a fair and honest reading and interpretation of relevant authorities" and "in good faith." *Id.*; *see also id.*, ECF No. 436-6, pp. 62-69. Carroll believed he relied in good faith on the 2006 Opinion Letter when he maintained the exempt classification of Quicken Loans' mortgage bankers. *Id.*, ECF No. 436-7, pp. 7-8.

C. Intervenors' Counsel Files Multiple Lawsuits Against Quicken Loans Attacking the Exempt Classification of Its Mortgage Bankers

Notwithstanding its painstaking analysis supporting the decision to classify its mortgage bankers as exempt from receiving overtime, Quicken Loans was required to vigorously defend against multiple overtime lawsuits filed by Intervenors' counsel during the six years prior to AI 2010-1. This was the first time Quicken Loans' classification of its mortgage

bankers and compensation structure had been challenged.

Intervenors' counsel initially filed three collective actions in the United States District Court for the Eastern District of Michigan. The first case, *Henry v. Quicken Loans, Inc.*, E.D. Mich. No. 2:04-cv-40346 (the "*Henry* litigation"), was filed on May 17, 2004, by Intervenor Henry on behalf of web mortgage bankers. The second case, *Chasteen v. Rock Financial*, E.D. Mich. No. 2:07-cv-10558 (the "*Chasteen* litigation"), was filed on February 6, 2007 by branch mortgage bankers, including Intervenor Nickols, who worked in Quicken Loans' Rock Financial division. The third case, *Mathis v. Quicken Loans, Inc.*, No. 2:07-cv-10981 (the "*Mathis* litigation"), was filed on March 7, 2007, by web mortgage bankers, including Intervenor Buck, who failed to timely opt into the *Henry* litigation.

After five years of discovery and motion practice, on September 30, 2009, the district court in the *Henry* litigation correctly entered summary judgment in favor of Quicken Loans on its Section 259 good faith defenses. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 571, pp. 21-26. The district court held that all claims after September 8, 2006 (*i.e.*, the date of the 2006 Opinion Letter) were barred as a matter of law because Quicken Loans acted in good faith under Section 259 in relying on the 2006 Opinion Letter

finding that mortgage loan officers are exempt administrative employees. *Id.*, p. 24.[7]

The district court also found a genuine issue of material fact regarding the overtime claims arising prior to September 8, 2006. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 571, pp. 15-18, 29-30. The *Henry* litigation proceeded to trial and the jury found in Quicken Loans' favor on all counts. *Id.*, ECF Nos. 707, 708.[8] That jury verdict was unanimously affirmed by the United States Court of Appeals for the Sixth Circuit. *Henry v. Quicken Loans, Inc.*, 698 F.3d 897 (6th Cir. 2012).[9]

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[7] On February 16, 2012, after granting Quicken Loans summary judgment on its Section 259 good faith defenses once again, the district court entered orders dismissing plaintiffs whose claims arose solely after September 8, 2006. *Mathis v. Quicken Loans, Inc.*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 324; *Chasteen v. Rock Financial*, No. 2:07-cv-10558 (E.D. Mich.), ECF No. 229; *Biggs v. Quicken Loans, Inc.*, No. 2:10-cv-11928 (E.D. Mich.), ECF No. 113. Thus, Intervenor Buck's claims were dismissed with prejudice. *Mathis*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 328, p. 3.

[8] The *Henry* litigation was the first, and currently is the only, mortgage banker exemption case to be tried by a jury.

[9] AI 2010-1 cannot apply to Intervenors' claims because their claims arose prior to AI 2010-1. Even the DOL concedes that AI 2010-1 cannot apply retroactively. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 13, 26-28, n.11. Further, Intervenors Henry and Buck have litigated all of their claims to conclusion – and lost. *See generally Henry*, 698 F.3d 897; *Mathis*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 328, p. 3.

D. The DOL Issues AI 2010-1

Unbeknownst to the district court and Quicken Loans, Intervenors' counsel contacted the DOL in 2009, following the summary judgment rulings in the *Henry* litigation. They requested that the DOL "immediately" and "quickly" withdraw the 2006 Opinion Letter (*Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 586-2, pp. 1-4), clearly to attempt to gain a tactical advantage in pending litigation.[10]

In 2010, the DOL dutifully responded to Intervenors' counsel with a private letter notifying them that the 2006 Opinion Letter purportedly had been withdrawn and enclosing a copy of AI 2010-1. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 588-1, p. 1. According to the DOL, AI 2010-1 "unambiguously represents a ***substantive*** change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees." *Id.*, ECF No.

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[10] Intervenors have impugned the Mortgage Bankers Association, Quicken Loans, and Attorney Robert Davis for years, claiming the 2006 Opinion Letter constitutes "regulatory capture." *See, e.g.*, Intervenors' Br., pp. 4-5; *see also Mortg. Bankers Ass'n v. Solis*, No. 12-5246 (D.C. Cir.), Doc. No. 1416138, pp. 2, 23-27. Intervenors' argument has been rejected repeatedly. *See, e.g.*, *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF Nos. 555, 556, 571. Even the DOL confirmed there was nothing improper or inappropriate in the DOL's issuance of the 2006 Opinion Letter. *Id.*, ECF No. 616, p. 6 (LOL stating the 2006 Opinion Letter was not arbitrary or capricious); *see also id.*, pp. 12-13.

609, pp. 27-28 (emphasis added). Through AI 2010-1, the DOL now purports to find that all mortgage loan officers do not satisfy the administrative exemption.

E. The Havoc Wreaked by the DOL's AI 2010-1

Six weeks after the DOL issued AI 2010-1, Intervenors' counsel filed a fourth case against Quicken Loans – *Biggs v. Quicken Loans, Inc.*, E.D. Mich. No. 2:10-cv-11928 (the "*Biggs* litigation"). The *Biggs* litigation was filed on the premise that AI 2010-1 imposes immediate liability on Quicken Loans. *Biggs*, No. 2:10-cv-11928 (E.D. Mich.), ECF No. 1, p. 2.

Around the same time, Intervenors' counsel requested that the district court reverse all of its earlier rulings in the *Henry* litigation, including its ruling on Quicken Loans' good faith defenses. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 618. Intervenors' counsel maintained that the district court must grant summary judgment as a matter of law in favor of the plaintiffs (including Intervenor *Henry*). *Id.*; *see also id.*, ECF No. 583. They claimed that AI 2010-1 "should be considered ***dispositive of the issue*** [*i.e.*, the exempt status of mortgage bankers] under any of the legal standards for deference described by the United States Supreme Court." *Id.*, ECF No. 585, p. 11 (emphasis added).

The district court issued an order to show cause requiring the DOL to explain the effect of AI 2010-1.

Id., ECF No. 596. In response to the order to show cause, the DOL filed an *amicus curiae* brief in the *Henry* litigation. *Id.*, ECF No. 609. The DOL urged the district court to give prospective deference to AI 2010-1. *Id.*, pp. 12-20. The district court ultimately denied Intervenors' counsel's attempt to reverse all of the court's prior rulings in the *Henry* litigation, which only involved claims accruing well before AI 2010-1 was issued by the DOL. *Id.*, ECF No. 666. The district court, however, refused to use or reference the 2006 Opinion Letter in connection with the trial in the *Henry* litigation, as AI 2010-1 purported to withdraw the DOL's prior definitive interpretation. *Id.*, ECF No. 669, p. 20. Further, in a subsequent ruling in the *Biggs* litigation, the district court also preliminarily indicated that AI 2010-1 is entitled to controlling deference prospectively. *See Biggs*, No. 2:10-cv-11928 (E.D. Mich.), ECF 80, pp. 11-12.

Quicken Loans maintains that the exempt classification of its mortgage bankers was, and always has been, correct. It agrees with the Mortgage Bankers Association that the DOL violated the APA when it issued AI 2010-1 without regard to the APA's notice-and-comment procedures. Quicken Loans maintains that AI 2010-1 is a legal nullity and that it may continue to rely on the 2006 Opinion Letter. *See id.*, ECF Nos. 141, 143. Nevertheless, Quicken Loans could not ignore the uncertainty and the allegations that liability was created immediately by the DOL's substantive change in its interpretation of the FLSA's administrative exemption regulations.

Quicken Loans immediately began the process of reviewing and ultimately changing the exempt classification of more than 1,500 mortgage bankers. The change became effective May 31, 2010 – nine weeks after the DOL issued AI 2010-1. The extensive process of changing the exempt classification of Quicken Loans' mortgage bankers entailed:

- Analyzing and attempting (unsuccessfully) to understand the authority that provided the basis for the DOL's abrupt and 180-degree change in its interpretation relating to the exempt classification of mortgage bankers;
- Determining whether it was feasible to reclassify Quicken Loans' mortgage bankers, in light of its business model and longstanding operations;
- Identifying the systems, processes, policies, and procedures that needed to be changed or created to convert 1,500 exempt mortgage bankers into non-exempt employees;
- Analyzing the effects of overtime compensation on mortgage banker commission structure and pay arrangements;
- Developing a new compensation plan, including new commission structures and pay arrangements to take into account that overtime now may be earned;
- Devising systems, processes, policies, and procedures regarding log-in/log-out and

other time tracking mechanisms necessary to accurately capture the number of hours actually worked by 1,500 mortgage bankers across the entire company;

- Formulating a plan to ensure mortgage bankers would be properly compensated for work outside the office;
- Devising and implementing a plan to address the effects of payroll changes (*e.g.*, payment in arrears, which takes into account hours worked, replaced payment in advance, which did not depend on the number of hours worked);
- Revising coverage schedules to account for the reduction of flexible working hours in favor of more controlled working times (*e.g.*, beginning and ending times, break periods, and lunch periods);
- Developing systems, processes, policies, and procedures for controlling hours worked and overtime earned;
- Providing ongoing training to mortgage bankers and leaders on the many changes associated with new systems, processes, policies, and procedures;
- Creating proper and effective acknowledgements and summaries regarding the changes to the way mortgage bankers are compensated and perform their job; and

- Devising and implementing an effective communications plan to attempt to explain to exempt financial services employees that they would now be treated as non-exempt employees.

This comprehensive overhaul of the mortgage banking business model was challenging, time-consuming, and costly. The extensive and complex changes could not be completed overnight. To the contrary, it took nine weeks. Many, if not all, of these changes could have been accomplished to avoid purported immediate liability if the DOL had complied with the APA's notice-and-comment procedures.

SUMMARY OF THE ARGUMENT

The APA's notice-and-comment rulemaking procedures ensure that affected parties are afforded the opportunity to comment on proposed rule changes and conform their behavior before a final rule becomes effective. The *Paralyzed Veterans* doctrine further protects interests of regulated entities by requiring administrative agencies – like the DOL – to comply with the APA before substantively changing a prior definitive interpretation. AI 2010-1 is a "substantive change" in the DOL's interpretation of the FLSA's administrative exemption regulations as they relate to mortgage bankers. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 27-28. The DOL's abrupt and substantive change violates the APA, particularly in light of the actual effect on regulated entities like

Quicken Loans who relied on the DOL's previous interpretation that mortgage bankers satisfy the administrative exemption.

ARGUMENT

The APA commands that agencies follow certain statutorily prescribed procedures before issuing a "rule."[11] 5 U.S.C. § 553. When an agency engages in "rule making,"[12] it must: (1) publish a general notice of proposed rulemaking in the Federal Register that includes "the terms or substance of the proposed rule or a description of the subjects and issues involved"; (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) "[a]fter consideration of the relevant matter presented . . . incorporat[ing] in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. §§ 553(b), (c).[13]

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[11] Under the APA, "rule" is defined in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4).

[12] "Rule making" is the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

[13] Executive Order No. 12866, 58 Fed. Reg. 51735, 1993 WL 388305 (Sept. 30, 1993), provides that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a

(Continued on following page)

The APA's rulemaking procedures are intended to "assure fairness and mature consideration of rules of general application." *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); *see also Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." (citation omitted)). The APA's notice-and-comment procedures also afford regulated parties a reasonable opportunity to conform their behavior before a final rule takes effect. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) ("Both the requirement of 553(b) that notice of proposed rulemaking be published in the Federal Register and the requirement of 553(d) that publication of a rule be made at least thirty days prior to its effective date serve the laudable purpose of informing affected parties and affording them a reasonable time to adjust to the new regulation.").

As the Mortgage Bankers Association aptly noted (MBA Brief at page 18), "[t]hose regulated by an

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comment period of not less than 60 days." *Id.* at Sec. 6(a)(1). Further, publication of a substantive rule "shall be made not less than 30 days before its effective date. . . ." 5 U.S.C. § 553(d).

administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)). To that end, the *Paralyzed Veterans* doctrine serves the vital purpose of protecting reliance interests of regulated entities by requiring administrative agencies to comply with the APA's notice-and-comment procedures before issuing substantive changes to a definitive interpretation. As administrations change in Washington, D.C., administrative fiat must not be permitted to replace the open and deliberative process required by the APA. Quicken Loans does not suggest that an administrative agency may never change the rules of the game. But when the rules are changed, regulated entities such as Quicken Loans must be given an opportunity – in advance – to plan for, and ensure compliance with, whatever new rules are properly promulgated. Quicken Loans was denied any such opportunity despite years of scrupulous consideration of relevant authority and reliance on the 2006 Opinion Letter.

Had the DOL complied with the APA's notice-and-comment procedures prior to issuing AI 2010-1, Quicken Loans would have been given the opportunity to provide comments regarding the exempt classification of mortgage bankers. It is unclear whether such "real life" experiences would have resulted in a different outcome. However, compliance with notice-and-comment procedures would have provided notice

of a potential substantive change in the DOL's prior definitive interpretation and time for Quicken Loans to devise (and implement, if necessary) a contingency plan. As demonstrated above, the need for compliance with the APA is all the more apparent where, as here, Intervenors are using the DOL's 180-degree reversal in an attempt to impose immediate liability where no liability previously existed. Agencies like the DOL are not permitted to make such drastic and unanticipated changes without complying with the APA.

CONCLUSION

For the foregoing reasons and those in the MBA Brief, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1041, 13-1052

IN THE

Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondents.

JEROME NICKOLS, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMICI CURIAE

NATIONAL LEAGUE OF CITIES

UNITED STATES CONFERENCE OF MAYORS

NATIONAL ASSOCIATION OF COUNTIES

INTERNATIONALCITY/COUNTY MANAGEMENT ASSOCIATION

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

GOVERNMENT FINANCE OFFICERS ASSOCIATION

NATIONAL SCHOOL BOARDS ASSOCIATION

NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. NOTICE AND COMMENT PROCEDURES ARE NECESSARY BEFORE MAKING SIGNIFICANT CHANGES TO DEFINITIVE AGENCY INTERPRETATIONS OF REEGULATIONS IN ORDER TO PRESERVE THE APA'S CAREFULLY CONSIDERED STATUTORY SCHEME AND THE SEPARATION OF POWERS 6

II. A NOTICE AND COMMENT PROCEDURE IS NECESSARY TO SAFEGUARD STATE AND LOCAL RELIANCE INTERESTS AND TO PRESERVE THE APPROPRIATE BALANCE BETWEEN STATEAND FEDERAL POWER 18

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Prof'l Hunters Ass'n Inc. v. F.A.A., 177 F.3d 1030 (D.C. Cir. 1999) 21, 22

Appalachian Power Co. v. E.P.A., 208 F.3d 1015 (D.C. Cir. 2000) 19

Auer v. Robbins, 519 U.S. 452 (1997) 6, 17, 14

Barnhart v. Walton, 535 U.S. 212 (2002) ..... passim

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) ..... passim

Christensen v. Harris Cnty., 529 U.S. 576 (2000) 4, 7

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 16, 26

Chrysler Corp. v. Brown, 441 U.S.281 (1979) 6, 8, 14

Davis v. EPA, 348 F.3d 772 (9th Cir. 2003) 10

Decker v. Northwest Envt'l Defense Ctr., 133 S. Ct. 1326 (2013) 15, 16, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Dyson v. Miles Labs, Inc.,
394 N.Y.S. 2d 86 (N.Y. App. Div. 1977) 19

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 16

F.C.C. v. Fox Television Stations, Inc.,
566 U.S. 202 (2009) 14

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 21, 24

Hinderer v. Director, Mich. Dep't of Social Servs., 291 N.W.2d 672
(Mich. App. (1980) 20

Huntington Mem'l Hosp. v. Super Ct.,
32 Cal. Rptr. 3d 373 (Cal. Ct. App. 2005) 19

Iowa League of Cities v. EPA,
711 F.3d 844 (8th Cir. 2013) 17, 27, 29

LaSalle Bank N.A. II v. Shearon,
881 N.Y.S. 2d 599 (N.Y. Sup. Ct. 2009) 20

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 8

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Morton v. Ruiz,
415 U.S. 199 (1974) 7

Mylan Labs. Inc.v. Thompson,
389 F.3d 1272 (D.C. Cir. 2004) 10

Nat'l Automatic Laundry & Cleaning Council v. Schulz,
443 F.2d 689 (D.C. Cir. 1971) 14

NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,
513 U.S. 251 (1995) 9, 14

NRLB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 15

Purdham v. Fairfax Cnty. Sch. Bd.,
637 F.3d 421 (4th Cir. 2011) 23

Putnam Family P'ship v. City of Yucaipa, 673 F.3d 920 (9th Cir. 2012) 20

S. Motor Carriers Rate Conference Inc. v. United States, 471 U.S. 48 (1984) 18

Sandifer v. U.S. Steel Corp.,
678 F.3d 590 (7th Cir. 2012) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Schafer v. Weast,
546 U.S. 49 (2005) 20

See's Candy Shops, Inc. v. Super. Ct.,
148 Cal. Rptr. 3d 690 (Cal. Ct. App.
2012) 19

Shalala v. Guernsey Mem. Hosp.,
514 U.S. 87 (1995) 15

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 13, 25

Smiley v. Citibank (S.D.), N.A.,
517 U.S. 735 (1996) 4, 14

Talk Am. Inc. v. Mich. Bell Tel. Co.,
131 S. Ct 2254 (2011) 16, 26

Thomas Jefferson Univ. v. Shalala,
521 U.S. 504 (1994) 16

United States v. Iverson,
162 F.3d 1015 (9th Cir. 1998) 19

United States v. Mead Corp.,
533 U.S. 218 (2001) .....passim

Univ. of Texas S.W. Medical Ctr. v.
Nassar, 133 S. Ct. 2517 (2013) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 8

Va. Highlands Airport Auth. v. Singleton Auto Parts, Inc., 670 S.E.2d 734 (Va. 2009) 19

STATUTES

5 U.S.C. § 553 7

5 U.S.C. § 706 15

19 U.S.C. § 1202 9

29 U.S.C. § 213 12

MD. CODE ANN., TAX-GEN. § 10-203 20

REGULATIONS

29 C.F.R. § 541.200 ..... 7, 11

40 C.F.R. § 131.13 28

OTHER AUTHORITIES

ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 313 (1946) (statement of Sen. McCarren) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Br. of Appellee Fairfax Cnty. Sch. Bd. 23

Br. Of Nat'l Sch. Bd. Ass'n et al. as *Amicus Curiae* 23

Clyde W. Crews, Jr. *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (Jan. 2014) 11, 20, 26

DOL Op. Ltr., Wage & Hour Div., 1999 WL 1002401 (May 17, 1999) 22

DOL Op. Ltr., Wage & Hour Div., FLSA2001-19 (Nov. 27, 2001) 24

DOL Op. Ltr., Wage & Hour Div., FLSA2005-51 (Nov. 10, 2005) 22

DOL Op. Ltr., Wage & Hour Div., 1993 WL 901152) 24

DOL Op. Ltr., Wage & Hour Div., 1993 WL 901155) 24

DOL Op. Ltr., Wage & Hour Div., 1993 WL 901159) 24

DOL Op. Ltr., Wage & Hour Div., 1993 WL 901160) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from Senators Chuck Grassley and David Vitter to the Acting Administrator of the EPA (June 18, 2013) 17

Montesquieu, SPIRIT OF THE LAWS (O. Piest ed., T. Nugent transl. 1949) 16

U.S. Fire Administration, *Retention & Recruitment for the Volunteer Emergency Services* (2004) 24, 25

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650 ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME (2011) 26

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[*]

Amici respectfully submit this *amici curiae* brief in support of Respondent. *Amici* seek to offer additional reasons that this Court should affirm the District of Columbia Circuit's holding that significant changes to definitive interpretive rules are subject to notice and comment requirements.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the

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[*]Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici curiae* brief.

nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 17,500 members are dedicated to the sound management of government financial resources.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents

its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high-quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy. *Amici curiae* have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is reversed. As *amici* argue herein, the D.C. Circuit's opinion has ample support in the text and structure

of the Administrative Procedure Act (APA), and reversing it would be detrimental to state and local governments that regulate in the same space as the federal government. If the D.C. Circuit's decision is not affirmed, state and local governments would find themselves buffeted by the changing winds at federal agencies with little opportunity to participate in the formulation of binding rules that have a substantial effect on state and local government policy and regulation.

SUMMARY OF ARGUMENT

I. Since the enactment of the APA in 1946, this Court has afforded different levels of deference and binding legal effect to agency statements depending primarily on two attributes: whether the agency statement in question clarified a statute or a regulation, and whether the agency invited some kind of public or private participation prior to issuing the statement. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Two decisions, however, have introduced additional complexity to that traditional scheme by stating that deference need not go hand in hand with procedural formality. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

This decoupling of deference and procedural formality tends to maximize agency discretion and flexibility at the expense of the reliance and expectancy interests of regulated parties. Requiring a notice and comment process for significant changes to agency statements interpreting regulations would

help to restore the balance between agency discretion and the reliance interests that the APA was designed to protect. Moreover, it would guard against the latent threat to the separation of powers presented by an agency's dual status as both author and interpreter of its regulations.

II. *Amici* state and local governments have a significant interest in, and would benefit from, requiring a notice and comment period before federal agencies may make significant changes to their interpretations of regulations. State and local governments often regulate in the same space as federal authorities, and often incorporate federal guidance into their own statutory and regulatory schemes. Significant unannounced changes to those underlying federal standards may be highly disruptive to those schemes, necessitating either new legislation or state agency action, even if such changes are not in the best interest of the State or locality. Federal agencies can preserve the flexibility to amend the rules and standards that they issue, and achieve better results and minimal disruption to state and local governments, if those agencies are required to allow comment on those rules before they are issued. Such a comment period would be a far more efficient method of allowing state and local governments to raise concerns, at a fraction of the cost of expensive litigation. Furthermore, allowing greater state and local participation in the process would avoid, or at least limit, the risk to federalism posed by ever-expanding federal agency authority.

Given the doctrinal reasons to require federal agencies to use a notice and comment process prior to making significant changes to their

interpretations, as well as the strong reliance interests at stake, *amici* respectfully ask this Court to affirm the D.C. Circuit's decision.

ARGUMENT

I. NOTICE AND COMMENT PROCEDURES ARE NECESSARY BEFORE MAKING SIGNIFICANT CHANGES TO DEFINITIVE AGENCY INTERPRETATIONS OF REGULATIONS IN ORDER TO PRESERVE THE APA'S CAREFULLY CONSIDERED STATUTORY SCHEME AND THE SEPARATION OF POWERS.

1. Administrative agencies construe two very different species of legal authority: statutes enacted by Congress (to the extent they have been authorized to do so, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984)), and regulations duly promulgated by the agency through an administrative adjudication or through notice and comment rulemaking, *see Auer v. Robbins*, 519 U.S. 452, 461 (1997).

When interpretations are "issued pursuant to statutory authority," "affect individual rights and obligations," and are intended to bind the public, they are often referred to as "substantive" or "legislative-type rule[s]." *Chrysler Corp. v. Brown*, 441 U.S. 281, 300–03 (1979). Because these rules may bind third parties, they "must conform with any procedural requirements imposed by Congress," including, as relevant here, a notice and comment

process. *Id.* at 303 (citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).[1]

Agency statements may also be classified as "interpretive rules." Due to their procedural informality and (typically) non-binding effect on third parties, interpretive rules receive "some weight," but do not receive the "same deference as norms that derive from the exercise of * * * delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *see* 5 U.S.C. § 553(b)(3)(A) (exempting "interpretive rules" from notice and comment procedures); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (stating that an interpretation in an opinion letter that was not arrived at through "a formal adjudication or notice-and-comment rulemaking" "[did] not warrant *Chevron*-style deference").

Neither "interpretive rule" nor "legislative rule" is defined in the APA. But the APA clearly contemplates a correlation between the amount of process an agency utilizes in issuing a statement and the amount of deference—and thus, binding legal effect—that statement will receive. Procedural formality, in other words, has long been a proxy for whether an agency statement has the "force of law"

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[1] Respondent Mortgage Bankers Association has offered a number of persuasive reasons, with which *amici* agree, as to why the Department of Labor's (Department) 2010 opinion letter interpreting 29 C.F.R. § 541.200(a)(2) properly should be analyzed as a legislative rule, and should conform with the APA's procedural requirements as a result. *See* Resp. Br. at 37, 43–44, 48. This brief, however, explains why the same result is proper even if both the 2010 and 2006 opinion letters are treated as "interpretive rules."

and whether it merits deference. This Court has explained that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (deferring to challenged interpretation in part because it was promulgated and amended pursuant to a notice and comment procedure which created no "unfair surprise" to the public).

This approach helps to "maintain[] the balance" wrought by the APA by "ensuring that agencies comply with the outline of minimum essential rights and procedures." *Brown*, 441 U.S. at 313 (quotations omitted); *see also Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523–2 (1978) (describing the APA as a compromise that settled "long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces ha[d] come to rest").

2. Until recently, the APA's basic compromise between procedural formality and deference remained relatively unchanged. But a series of decisions, including *United States v. Mead* and *Barnhart v. Walton*, have carved out an exception to that traditional framework by affording informal interpretive rules controlling force—even if they were not initially intended to have such effect—if they meet certain specified criteria.

In *Mead*, the Court considered a series of rulings letters issued by the United States Customs Service. The Court ultimately concluded that these letters, which were issued pursuant to the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, were "best treated like interpretations contained in policy statements," and were not entitled to *Chevron* deference because, among other reasons, they were issued by the thousands every year and binding only on individual parties. *See* 533 U.S. at 233–34 (quotations omitted). However, the Court did not rule out the possibility that the letters could have received controlling effect had the facts been different, noting that there were sometimes "reasons for *Chevron* deference even when [no notice and comment rulemaking] was required and none was afforded." *Id.* at 231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995) (affording *Chevron* deference to statements of the Comptroller of the Currency because he was "charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws")).

The Court picked up this theme again in *Barnhart v. Walton*, 535 U.S. 212 (2002), where it elaborated a non-exhaustive list of factors to determine whether an interpretive rule derived from a regulation warranted deference. In particular, the Court analyzed (1) whether the legal question being interpreted by the agency was "interstitial" or necessary to resolve some ambiguity in the regulation; (2) whether the agency had "related

expertise" suited to the question at hand; (3) whether the question was of importance to the "administration of the statute"; (4) whether the administration of the statute was "complex"; and (5) whether it appeared the agency had given the question "careful consideration" "over a long period of time." *Id.* at 222. Analyzing those factors together, the Court concluded that an interpretive rule defining the term "inability" in a regulation promulgated under the Social Security Act merited deference and could be afforded controlling effect notwithstanding the fact that it had not been promulgated through any kind of formal process. *Id.*[2]

The possibility that interpretive rules might receive *Chevron*-like deference, however, was not contemplated by the drafters of the APA. To the contrary, contemporaneous legislative history reflects an understanding that interpretative rules were exempt from pre-adoption notice and comment because "interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review," and implicitly would *not* receive any *Chevron*-style deference. *See* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 313 (1946) (statement of Sen. McCarren).

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[2] Controlling deference has been afforded to interpretive rules in other situations as well. *See, e.g.*, *Davis v. EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003) (affording *Chevron* deference to an EPA interpretation of the Clean Air Act); *Mylan Labs. Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (affording *Chevron* deference to FDA opinion letters).

As agencies continue to increase their volume of interpretive rulings—by one estimate, federal agencies issued more than 24,000 "Public Notices," including "guidance documents," in 2013 alone, compared with only 3,500 or so rules—the creation of this new category of rules is likely to assume greater significance. *See* Clyde W. Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, at 25 (Jan. 2014), *available at* http://cei.org/sites/default/files/Wayne%20Crews%20%20Ten%20Thousand%20Commandments%202014.pdf. Therefore, to maintain the "hard fought" balance the APA achieved in light of the potential complications posed by *Mead* and *Barnhart*, significant changes to interpretive statements that would otherwise be entitled to *Chevron* deference under the reasoning in those cases (sometimes described as "definitive" interpretations, *see* Resp. Br. at 16, 20) should be made using a notice and comment process.

3. This approach validates the D.C. Circuit's decision in this case. Here, the Department of Labor's 2006 interpretation of 29 C.F.R. § 541.200(a)(2), which found that mortgage loan officers were exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, is entitled to deference because it meets most if not all of the *Mead / Barnhart* factors:[3]

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[3] 29 C.F.R. § 541.200(a)(2) states, in full: "(a) The term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act shall mean any employee: (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

First, the 2006 interpretation is a valid exercise of the Secretary of Labor's authority to resolve "interstitial" questions: Section 541.200 was promulgated pursuant to the Secretary of Labor's authority to interpret the FLSA, *see* 29 U.S.C. § 213(a)(1),[4] and the interpretation at issue—a 2006 Administrator Opinion Letter sent to the Mortgage Bankers Association—was signed by the Administrator of the Department's Wage and Hour Division. *Second*, the Wage and Hour Administrator, as the head of that division of the Department, clearly has the "related expertise" to decide which types of employees are exempt from the FLSA's overtime requirements based on the duties they perform. *Third*, the question of which employees are exempt from the overtime requirements is, of course, critical to the interpretation of the wage and hour provisions of the FLSA. *Fourth*, that question is a "complex" one because it requires a nuanced assessment of not only what the employee's "primary" duties are, but also whether those duties are "related to the management or general business operations of the employer," and if so, whether they are "directly" related. None of these questions has an obvious answer, and indeed, the Department has reversed its position at least twice on this issue. *See* Resp. Br. at 2–7. *Fifth*, the Administrator's 2006 interpretation

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[4] 29 U.S.C. § 213(a)(1) states, in relevant part that "any employee employed * * * in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [5 U.S.C. §§ 551–59] * * *)" is exempt from the FLSA's overtime requirements.

included a detailed analysis of the relevant regulations and applicable case law, and was not only communicated directly to MBA, but also published on the Department's website as general guidance available to, and regularly consulted by, members of the public seeking to understand the Department's position on various labor and employment issues.

The rulings letters in *Mead*, by contrast, satisfied few if any of these factors. There, it was not at all obvious that "Congress meant to delegate authority to Customs to issue clarification rulings with the force of law" as part of its statutory grant of authority. *Mead*, 533 U.S. at 232–33. And, while the Customs Service undoubtedly had "related expertise" to issue rulings letters, readers of the rulings letters were explicitly cautioned that they were not definitive interpretations and should not be relied upon by third parties. *See id.* That in turn suggested that the letters were merely intended to respond to the particular parties to a dispute, rather than to provide guidance regarding the administration of any statute or regulation. In addition, the letters were issued by the thousands every year by forty-six different customs offices, suggesting that they were crafted with the goal of expediency in mind, rather than "careful consideration." *Id.*; *see also Univ. of Texas S.W. Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (declining to afford the EEOC guidance manual even *Skidmore* deference because the manual's reasoning was circular and was not sufficiently grounded in the provisions of the statutory scheme).

Here, as discussed above, the Secretary and his deputies are expressly authorized to promulgate and interpret regulations under the FLSA, and the detailed, carefully reasoned 2006 interpretation was widely publicized without any caveats about relying on its guidance. Given the authoritative source of the interpretation and its broad public dissemination in a format said to constitute a "final agency action" under longstanding D.C. Circuit precedent, *see Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701–02 (D.C. Cir. 1971) (involving a published opinion letter signed by the administrator of an agency), the 2006 interpretation can be said to have affected the "individual rights and obligations" of third parties, *Brown*, 441 U.S. at 303, and would be entitled to *Chevron*-style deference under this Court's precedents. *See Barnhart*, 535 U.S. at 222; *NationsBank*, 513 U.S. at 256–57.

If the Department of Labor's 2006 interpretive rule is to receive *Chevron*-style deference, however, it is sufficiently definitive and likely to induce reliance that it should not have been significantly altered without the same notice and comment process that is required to amend other binding legal rules. As a result, the 2010 interpretation, which was also declared to be "substantive" and "controlling," Resp. Br. at 8, was correctly found to be procedurally invalid. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (alluding to the possibility that a more robust explanation for a change in policy may be required "when [an agency's] prior policy has engendered serious reliance interests"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("Sudden and unexplained

change * * * or change that does not take account of legitimate reliance on prior interpretation * * * may be 'arbitrary, capricious [or] an abuse of discretion.'" (citing 5 U.S.C. § 706(2)(A))); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding if it would impose "new liability * * * on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements"). Were it otherwise, an agency could disrupt settled expectations and make arbitrary changes to its interpretations with impunity, and still be entitled to deference. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) ("APA rulemaking would * * * be required if [the agency's interpretive rule] adopted a new position inconsistent with any of the [agency's] existing regulations.").

4. Requiring a notice and comment process for significant changes to interpretive rules would also advance another important goal: preserving the separation of powers.

The typical practice of affording *Chevron* deference to reasonable agency constructions of ambiguous statutes poses no separation of powers problem because Congress, as the author of the statute that will be ceding interpretive authority to another entity, has an incentive to "speak as clearly as possible on matters it regards as important." *Decker v. Nw. Envt'l Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013). If Congress wants to make a wholesale delegation of authority to an agency to interpret a statute, it can clearly say so by "explicitly [leaving] a gap for the agency to fill." *Chevron*, 467 U.S. at 843.

If it wants to take a more limited approach, it may do that as well. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where delegation of authority did not include the power to "promulgate rules or regulations") (quotations omitted).

But, the practice of affording *Chevron*-style deference to some agency interpretations of their own regulations, whether set forth in interpretive rules or other statements, as courts now do pursuant to *Auer*, 519 U.S. at 461, poses grave separation of powers concerns. As Justice Scalia argued in *Decker*, "'[w]hen the legislative and executive powers are united in the same person * * * there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'" 133 S. Ct. at 1341 (Scalia, J., dissenting) (quoting Montesquieu, SPIRIT OF THE LAWS bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)). Specifically, permitting an agency to both author and interpret its own regulations encourages agencies to "issue vague regulations" in order to "maximize agency power." *Id.* at 1341 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)). Not only does this structure create a risk of "arbitrary government," *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring), it also creates considerable uncertainty and thus "frustrat[es] the notice and predictability purposes of rulemaking." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

There are good arguments to abandon *Auer* deference entirely. *See Decker*, 133 S. Ct. at 1339–40 (Scalia, J., dissenting). But even without overruling *Auer*, this Court can reduce the separation of powers concern it creates, and the accompanying risk of arbitrary governance, by requiring a notice and comment process for significant changes to interpretations of regulations. Such a process would accomplish these ends by limiting an agency's ability to make drastic changes to its own regulations through "interpretive" revisions that fail to incorporate private or public feedback or input.[5]

In short, affirming the D.C. Circuit's ruling requiring a notice and comment process prior to making a significant change to an agency interpretation is firmly supported by the structure of the APA and would accomplish two important ends:

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[5] One recent example, discussed more fully *infra* Part II, demonstrates that judicial review may not be a sufficient protection for regulated parties where an agency is determined to implement its agenda without notice and comment. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), for example, the Eighth Circuit invalidated the EPA's effort to modify certain regulations implementing the Clean Water Act's wastewater treatment provisions through "guidance letters" and without a formal rulemaking process. *See id.* at 874. Despite the Eighth Circuit's ruling, the EPA decided it would continue with that effort in all States outside of the Eighth Circuit's jurisdiction, which has created tremendous confusion, not to mention anger over the agency's lack of transparency. *See* Letter from Senators Chuck Grassley and David Vitter to the Acting Administrator of the EPA (June 18, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=5cbc9d40-f565-22ef-2882-9f8c0dc929ed.

It would restore the balance between agency discretion and reliance interests that is fundamental to the APA's statutory scheme, and would avoid, or at least mitigate, the separation of powers problem posed by undue deference to agency interpretations of their own regulations.

II. A NOTICE AND COMMENT PROCEDURE IS NECESSARY TO SAFEGUARD STATE AND LOCAL RELIANCE INTERESTS AND TO PRESERVE THE APPROPRIATE BALANCE BETWEEN STATE AND FEDERAL POWER.

In addition to the sound legal reasons to require agencies to use a notice and comment process prior to making significant changes to interpretations of regulations, such a requirement would safeguard state and local reliance interests, improve federal policymaking, and protect against gradual shifts in the balance of state and federal power. These federalism interests are of considerable importance to *amici*.

1. All regulated parties have reliance interests that are affected when a federal agency makes a significant change to an interpretive rule without notifying the public and offering an opportunity for participation. But the reliance interests of the state and local government entities represented by *amici* are particularly significant because these entities often regulate in the same space as the federal government and routinely incorporate pertinent statutes and regulations into their own policies, laws, and regulations. *See, e.g.*, *S. Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48, 64

(1984) (acknowledging critical role that state agencies play in enacting federal policy at the state level).

This type of incorporation occurs in a variety of fields, including:

- environmental regulation, *see Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (requiring States to incorporate federal air quality standards into state-issued pollution permits); *United States v. Iverson*, 162 F.3d 1015, 1020 (9th Cir. 1998) (state codes incorporate federal pollution discharge standards);
- employment and labor regulation, *see See's Candy Shops, Inc. v. Super. Ct.*, 148 Cal. Rptr. 3d 690, 699–700 (Cal. Ct. App. 2012) (California statutes incorporate federal statutes, regulations, and interpretations regarding timekeeping policies); *Huntington Mem'l Hosp. v. Super. Ct.*, 32 Cal. Rptr. 3d 373, 376–78 (Cal. Ct. App. 2005) (California statutes incorporate federal statutes and regulations regarding the "regular rate" of pay);
- consumer protection, *Dyson v. Miles Labs., Inc.*, 394 N.Y.S.2d 86, 87 (N.Y. App. Div. 1977) (New York statute incorporated FDCA branding regulations);
- transportation, *Va. Highlands Airport Auth. v. Singleton Auto Parts, Inc.*, 670 S.E.2d 734, 738 (Va. 2009) (Virginia local ordinance regulating obstructions of airspace incorporated specific FAA regulations);

- banking and finance, *LaSalle Bank, N.A., II v. Shearon*, 881 N.Y.S.2d 599, 605 (N.Y. Sup. Ct. 2009) (New York Banking Law incorporates various federal banking regulations);
- special education, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (noting that the Individuals with Disabilities Education Act gives States "primary responsibility for developing and executing educational programs for handicapped children," subject to "cooperation and reporting between state and federal educational authorities") (citations omitted);
- taxation, *see, e.g.*, MD. CODE ANN., TAX-GEN. § 10-203 (defining "adjusted gross income" as the individual's "federal adjusted gross income for the taxable year");
- social services, *Hinderer v. Dep't of Soc. Servs.*, 291 N.W.2d 672, 675 (Mich. Ct. App. 1980) (Michigan statute incorporated federal regulations regarding income requirements for welfare eligibility); and
- zoning and property law, *see Putnam Family P'ship v. City of Yucaipa*, 673 F.3d 920, 930 n.6 (9th Cir. 2012) (state or local laws may incorporate federal accessibility standards for housing).

In addition to the foregoing, federal agencies issue almost 600 regulations per year that directly affect state and local governments; in some years, there have been well over 1,200. *See* Crews, *Ten Thousand Commandments* at 45. As a result, whenever a federal agency makes a significant change to its interpretation of one of the statutes or regulations incorporated into state laws or

regulations, or a regulation that affects a State directly, the entire legislative and regulatory apparatus must be adjusted to accommodate the change. While such shifts might still be necessary even with a notice and comment process, such a process could ameliorate the disruption by alerting the federal agency to the costs and burdens associated with the change, and perhaps encouraging States and localities to work with the federal agency to find a more mutually convenient solution.

2. A second issue that arises where federal agencies are permitted to make significant changes to interpretations of regulations without notice and comment is that States and localities are deprived of an opportunity to offer their input and expertise prior to the formal change in policy. Such input is often necessary because federal agencies, by virtue of their focus on issues of national concern, are generally ill-equipped to address or understand the particular challenges or concerns facing States and localities. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) (noting that federal employees enforcing federal regulations "have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible" and are "hardly as accessible and responsive as those who occupy analogous positions in state and local governments").

This type of "information gap" between federal authorities and local regulated parties was readily apparent in *Alaska Hunters*. There, the federal government decided to change its interpretation of a

longstanding rule to require Alaskan private pilots operating hunting or fishing expeditions to comply with the same stringent standards applied to commercial pilots on the theory that the piloting was not incidental to the activity of hunting, but was rather transportation "for hire." *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1032 (D.C. Cir. 1999). This change in interpretation had serious consequences for the many individuals who had set up their own lodges and businesses in reliance on the original interpretation. A far better result could have been reached by seeking local input: As the D.C. Circuit stated, "[h]ad guides and lodge operators been able to comment on the resulting amendments and modifications to [the regulation at issue], they could have suggested changes or exceptions that would have accommodated the unique circumstances of Alaskan air carriage." *Id.* at 1035–36.

Such input is particularly important given the budgetary shortfalls faced by many States and localities. In one recent example, the Department of Labor altered its interpretation of a longstanding rule concerning the payment of a stipend, or a "nominal fee," to school staff members who volunteered to coach student athletic teams. In its 1999 interpretation, the Department concluded that such stipends did not trigger any federal or state overtime requirements so long as the stipend, divided across the hours the employee spent coaching, was less than the minimum wage. DOL Op. Ltr., Wage & Hour Div., 1999 WL 1002401 (May 17, 1999). In 2005, however, the Department withdrew that interpretation and concluded that the

amount of the stipend could not exceed 20% of the salary the school would pay to a full-time coach in order to avoid having to pay overtime under the FLSA. DOL Op. Ltr., Wage & Hour Div., FLSA2005-51 (Nov. 10, 2005). But many local schools did not have any such full-time coaches, did not participate in any sort of market for coaches, and had no clear way of gauging whether their stipend would comply with the FLSA. *See, e.g.*, Br. of Appellee Fairfax Cnty. Sch. Bd. at 50–58, Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408), 2010 WL 2661193.

While the schools could have avoided any issue with FLSA compliance by paying overtime, many schools were already strapped for cash and simply did not have the budget to support such an additional expense. *See* Br. of Nat'l Sch. Bd. Ass'n et al. as *Amicus Curiae* at 14–18, Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421 (4th Cir. 2011) (No. 10-1408). Not wanting to find themselves at the center of a lawsuit over a regulation of uncertain interpretation, and unable to marshal the funds to pay overtime, many schools simply eliminated the stipends altogether, to the detriment of the volunteer coaches, or eliminated the sports program, to the detriment of participating students. *See id.* at 18–19. Had there been a notice and comment process prior to the reversal of the agency's interpretation, the affected schools could have alerted the Department to the practical problems with its proposed standard and arrived at a solution that could be actually implemented without harming the coaching staff or the students in the affected programs.

Another example of state and local reliance interests being affected by changes in federal agency interpretations involved a series of opinion letters issued by the Department of Labor pertaining to municipal firefighters. In 1993, a few years after this Court concluded that the FLSA minimum wage and overtime provisions applied to state and local governments, *see Garcia*, 469 U.S. at 555–56, the Department issued a series of opinion letters concluding that career firefighters who volunteered their services to private organizations had to be paid overtime by whatever public entity employed them. *See* DOL Op. Ltrs., Wage & Hour Div., 1993 WL 901159, 1993 WL 901160, 1993 WL 901155, 1993 WL 901152. This was a departure from its previous policy stating that such volunteer services need not be separately compensated. *See* DOL Op. Ltr., Wage & Hour Div., FLSA2001-19 at 1 (Nov. 27, 2001) (discussing shifting agency policy on this issue). That departure required local governments to expend additional resources paying overtime, training additional volunteers, or hiring and training additional paid firefighters to meet their fire prevention needs. Other governments experienced an opposite, but equally problematic effect: In places where local labor agencies interpreted the 1993 opinion letter as extending to volunteer services by individuals in other professions (such as state police volunteering as firefighters), volunteer firefighters who were also city employees were released to avoid having to pay additional overtime. *See* U.S. Fire Administration, *Retention & Recruitment for the Volunteer Emergency Services* at 19 (2004) *available at* http://www.in.gov /dhs/files/retainrecruit.pdf.

In 2001, however, the Department reversed course again and concluded that no additional remuneration was necessary, provided that the firefighters volunteered at an independent, private, non-profit fire or rescue department that "exercises day-to-day control over what positions they hold as a volunteer, what they do and when they do it." FLSA2001-19 at 4. While this new interpretation may have relieved some pressure on local government budgets and understaffed local fire departments, it, like the Department opinion letter governing volunteer coaches, created confusion regarding its application. That confusion might have been avoided if local input had been sought before the interpretation was changed. *See Retention & Recruitment* at 22.

3. In addition, *ex post* challenges to agency interpretations are not a particularly viable means of limiting agency discretion. Not only do published interpretations receive deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), if not under *Chevron*, but they may also be prohibitively expensive or impractical to challenge. In the coaching example cited above, for instance, it was far more cost effective for the schools to get rid of the stipend and move coaches to a pure volunteer basis than to challenge the interpretation or risk being sued for non-payment of overtime. That mirrors the choice regulated parties have to make whenever a regulation is altered: Cease all activity (so as to avoid violating the new interpretation) and either challenge the interpretation or comply. Most entities, strapped for cash and burdened with other pressing priorities, will likely choose to comply, thus

removing any effective post-adoption check on agency reversals and increasing the risk of arbitrary governance that has concerned members of this Court. *See Talk Am. Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring) (excessive agency discretion "promotes arbitrary government"); *Christopher*, 132 S. Ct. at 2168 (same).

Anecdotal evidence seems to bear this out. For example, between 1995 and 2010, the EPA alone issued 1,176 regulations affecting state governments, and 789 regulations affecting local governments, but only 297 cases were brought by States, territories, municipalities, and regional government entities challenging EPA agency actions over that same period.[6] *See* Crews, *Ten Thousand Commandments* at 78–79; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 17 (2011). Each of those actions cost approximately $68,600 in attorney's fees alone, and fees can often be substantially higher: A 2010 case filed by New York and New Jersey against the EPA resulted in attorney's fees of almost $500,000—quite a substantial sum compared to the virtually costless process of submitting a comment through Regulations.gov. *See* GAO-11-650 at 23, 40; *see also*

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[6] Much of this litigation tended to track changes in presidential administrations, GAO-11-650 at 17, which often triggers changes in agency interpretations as well, *see, e.g.*, *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012) (noting repeated switches in position by Department of Labor on donning/doffing issues depending on the presidential administration).

http://www.regulations.gov/#!home.[7] As a result, the most meaningful opportunity for state and local governments to challenge or provide input regarding such reversals is *before* the agency changes its interpretation.

4. Notice and comment procedures not only guard against the risk of arbitrary governance generally, they may also alert state and local governments of threats to federalism. As the foregoing examples illustrate, state and local governments are often regulated by federal agencies and often regulate the same subject matter as those agencies. Allowing those agencies to alter definitive interpretations whenever they see fit without soliciting input from state and local entities would quickly encroach upon authority of state and local governments to regulate their own affairs.

Iowa League of Cities v. E.P.A., 711 F.3d 844 (8th Cir. 2013), a case involving wastewater discharge regulations under the Clean Water Act (CWA), illustrates the very real risk to federalism that unchecked agency discretion can create. Under the CWA, state and federal governments must work in tandem to regulate, among other things, wastewater discharges in order to preserve water quality standards. States and municipalities have a significant degree of discretion in setting up their own programs, though that discretion is "exercised against a backdrop of significant EPA authority over

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[7] These fee estimates are taken from cases where the state or local entity actually succeeded in recovering fees. These cases are fairly rare; the data is used only as an estimate of what the fee costs would be without a fee award.

state-run * * * programs." *Id.* at 856. Under longstanding EPA policy, "[S]tates should exercise their 'discretion'—as set forth in 40 C.F.R. § 131.13—to adopt a 'definitive statement' in their water quality standards" regarding the use of "mixing zones," which are generally defined as areas where a wastewater plant may allow concentrations of various effluents to exceed federal standards. *Id.* at 873–74; 857. While these "zones" were subject to certain federal restrictions, States had the ability to determine whether to use them or not. However, in a 2011 "guidance" letter, the EPA categorically stated that such mixing zones "should not be permitted," thus "eviscerat[ing] state discretion to incorporate mixing zones into their water quality standards." *Id.* at 874.

The Eighth Circuit concluded that this "guidance" was not merely an interpretation but rather a "new legal norm" that should have been promulgated through notice and comment. *Id.*[8] The court also referenced the fact that EPA's efforts to make substantive changes to its regulations through "guidance" could prove to be very costly for

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[8] A similar analysis was applied to another regulation involving "blending," which is a type of treatment process which various municipalities had hoped to use in their wastewater treatment plants. *See id.* at 858. Whereas previous regulations had posed no absolute bar to using those types of treatments, another FDA "guidance" letter categorically stated that such treatments could only be used if there were "no feasible alternatives." *Id.* at 875. As with the mixing zones, the Eighth Circuit concluded that this "guidance" was really a new legal norm that had no basis in any existing regulations and was invalid because it was not promulgated through a notice and comment procedure. *Id.* at 876.

municipalities who "must either immediately alter their behavior [based on the new 'guidance'] or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the letters but will be rejected when the letters are applied as written." *Id.* at 868.

Iowa League of Cities, like this case, supports the principle that courts must be active in ensuring that the "formerly flexible strata" of interpretive rules do not "ossify into rule-like rigidity" by evading notice and comment or judicial review. *Id.* at 873. And when that ossification occurs in a space where the States and the federal government regulate concurrently, or collaboratively, it may not be long before the "tyranny of small decisions" produces a sizeable and irreversible shift in the balance of state and federal power. *Id.*

In sum, requiring a notice and comment period for significant changes to interpretive rules would have at least three salutary effects for state and local governments: It would avoid undue disruption to state and local regulatory apparatuses that incorporate federal regulations and standards; improve federal policymaking by allowing regulated entities to participate in the regulatory process; and prevent a slow and creeping realignment of state and federal power.

CONCLUSION

For all of these reasons, the Court should affirm the judgment below.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Nos. 13-1041, 13-1052

In the Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF THE DEPARTMENT OF LABOR, *ET AL.*,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, *ET AL.*,
Respondents.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE THOMAS JEFFERSON INSTITUTE FOR PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

Inasmuch as *Auer* Required the Court of Appeals to Defer to Interpretative Rules as Much as to Legislative Rules, the Decision Below Should be Affirmed 2

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Barnhart v. Walton,
535 U.S. 212 (2002) 3

Bigelow v. Dep't of Def.,
217 F.3d 875 (D.C. Cir. 2000) 3

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 3

Capital Network Sys., Inc. v. FCC,
28 F.3d 201 (D.C. Cir. 1994) 4

Chevron, U.S.A., Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 3, 4, 5, 9

Christensen v. Harris County,
529 U.S. 576 (2000) 3

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 7

City of Arlington v. FCC,
133 S.Ct. 1863 (2013) 8

Decker v. Northwest Env'tl. Def. Ctr.,
133 S.Ct. 1326 (2013) 9

Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 3

Judulang v. Holder,
132 S.Ct. 476 (2011) 5

Martin v. OSHRC,
499 U.S. 144 (1991) 6, 7

Nat'l Cable & Telecomms. Assn. v Brand X Internet Servs.,
545 U.S. 967 (2005) 8

Paralyzed Veterans of Am. v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) 4

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 3

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 8

Udall v. Tallman,
380 U.S. 1 (1965) 4

United States v. Mead Corp.,
533 U.S. 218 (2001) 4

STATUTES

5 U.S.C. § 551 1

5 U.S.C. § 553 . . . . . 2, 8

5 U.S.C. § 706 8

OTHER AUTHORITIES

ATT'Y GENERAL'S MANUAL ON THE APA (1947) 8

FINAL REP. OF ATT'Y GENERAL'S COMM. ON ADMIN. PROC. 27 (1941) 8

HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 199-200 (2d ed. 2013) 4

John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998) . . . 8

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612 (1996) . 6, 7

Representative Francis Walter, author of H.R. REP. NO. 79-1980 (1946) 8

Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000) 6

Robert A. Anthony and Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, 26 ADM. & REG. LAW NEWS 10-11 (2000) 8

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1 . . . . . 4, 5, 7

Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990) 5

Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121 (1988) 5, 6

S. Rep. No. 79-752 (1945) 8

STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., 2d Sess., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46, S. DOC. NO. 248 (1946) 7, 8

William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001) 4

INTEREST OF AMICUS CURIAE[1]

The Thomas Jefferson Institute for Public Policy (the "Institute") is a non-profit, non-partisan public policy organization with the goal of generating policy reform proposals for government and promoting policies that facilitate economic development in Virginia. The question presented in this case involving the Administrative Procedure Act is of vital importance to every business, entity, and person in Virginia that is regulated by the federal government. The Institute submits this brief for the purpose of ensuring greater transparency and accountability on the part of federal agencies whose actions affect the economic well-being of millions of Virginians.

SUMMARY OF THE ARGUMENT

The core of the Secretary of Labor's argument for reversing the D.C. Circuit's decision below is that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, (APA)'s requirements for notice and comment rulemaking do not apply to agency interpretative rules, because "unlike binding legislative rules, they do not have the force and effect of law." Pet. Br. at 11. The Secretary's argument, however, elides the elephant in courtroom: the deference doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997), under which interpretative rules such as the one at issue in this case have for all practical purposes attained the same force and effect of law as legislative rules.

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[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Counsel for petitioners and respondent consented to the filing of this brief.

Inasmuch as the *Auer* doctrine confers on interpretative rules the force and effect of law characteristic of legislative rules, the APA necessarily requires that such rules not be changed except after notice and the opportunity for public comment. *See* 5 U.S.C. § 553. So long as federal courts are obligated to afford *Auer* deference to interpretative rules, the decision below should stand. Put another way, the price of reversing the decision below is the overturning of *Auer*, which the Secretary presumably is unwilling to pay.

Amicus respectfully submits that *Auer* violates the separation of powers and is inconsistent with the text and legislative history of the APA, and as discussed below, should be overruled. But as no party has called for overruling *Auer* and its continuing validity is beyond the scope of the question presented, this Court should affirm the decision below, and expressly reserve the question of *Auer's* validity for another day.

ARGUMENT

Inasmuch as *Auer* Required the Court of Appeals to Defer to Interpretative Rules as Much as to Legislative Rules, the Decision Below Should be Affirmed

A central pillar of the Secretary of Labor's position is that the APA's requirements for notice and opportunity for public comment do not apply to interpretive rules because they lack "the force and effect of law." Pet. Br. 11, 17, 21, 30, 33. The Secretary argues that interpretive rules "merely [reflect] the agency's present belief concerning the meaning of . . . legislative rules," *id.* at 21, and that, "unlike binding

legislative rules, they do not have the force and effect of law," *id.* at 11; *see also id.* at 21.

The Secretary is incorrect, for under decisions such as *Auer v. Robbins*, 519 U.S. 452, 461 (1997), interpretive rules have in all but name attained the same force and effect of law as legislative rules.

Under *Auer*, an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its regulation is controlling "unless an alternative reading is compelled") (quote marks omitted). Indeed, this Court will apply *Auer* deference even to agencies' interpretations of regulations adopted without notice-and-comment rulemaking or formal adjudication. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (recognizing that *Auer* deference would be afforded to a mere opinion letter interpreting a regulation if the regulation were ambiguous).[2]

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[2] *See also Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) ("Although . . . *Christensen* . . . [held] that agency interpretations of *statutes* must derive from some formal agency action before judicial deference is due, the [Supreme] Court treated *Auer* . . . as still good law" with respect to agency interpretations of regulations) (emphasis added). Later cases held that informally-adopted agency interpretations of statutes might also receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Barnhart v. Walton*,

Auer is widely considered more deferential than, and certainly at least as deferential as, the "reasonableness" test applied under *Chevron*[3] to agencies' statutory interpretations embodied in legislative rules. *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("It is sometimes said that [*Auer*] deference is even *greater* than" *Chevron* deference) (emphasis in original); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) ("Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms.") (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.").[4] As such, "[t]he only

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535 U.S. 212, 221-22 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[4] *See also* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1343 (2001) ("[The *Auer* standard] is clearly 'strong' deference, equivalent to, if not stronger than, *Chevron* deference."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4 (interpreting Supreme Court precedent as potentially establishing "that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus greater legal force) than does a legislative rule"); *id.* at 7 n.13 (summarizing that "the judicial deference accorded agency 'interpretations' of regulations is at least as great as that accorded legislative rules"); *see also* HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 199-200 (2d ed. 2013) ("It has been suggested that the deference due an agency's interpretation of its

difference [between judicial review of legislative and interpretive rules is] whatever difference may exist (if, in practice, there is any) between 'arbitrary-or-capricious' review . . . and 'reasonableness' review. . . ." Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry,* 40 ADMIN. L. REV. 121, 134 (1988). With respect to interpretive rather than policy questions, the two inquiries appear to converge. *See Judulang v. Holder*, 132 S.Ct. 476, 483 & n.7 (2011) (noting that analysis of arbitrary or capricious under the APA "would be the same" as *Chevron* step two, which asks whether an agency's interpretation of a statute is "arbitrary or capricious in substance").

But giving interpretive rules under *Auer* at least as much deference as legislative rules confers on them "the practical force of law." Anthony, *The Supreme Court and the APA*, *supra* note 4, at 4. "In terms of their practical binding effect, . . . interpretive rules . . . [given such deference] would become virtually indistinguishable from legislative rules. . . . [A]s a practical matter, the agency would be able to bind the court and the public . . . ." Anthony, *Which Agency Interpretations Should Get Judicial Deference?*, *supra*, at 134; *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57 (1990) ("[A] practice of routine acceptance [of nonlegislative rules] would [permit agencies to] bind the public"). This effect arises because *Auer* provides the public no more recourse against an interpretative rule than against the legislative rule it

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own regulations is similar to the *Chevron* Step Two deference afforded an agency's interpretation of its authorizing statute.").

construes; it thus impels the public to accede to the interpretive rule as if it were the legislative rule itself; as Professor Anthony explains, although interpretive rules are not supposed to "bind private parties,"

> that would be the result if *Chevron* deference were accorded to interpretive rules, since the courts would have to accept them unless they were unreasonable, very much as they must do with legislative rules. In terms of their practical binding effect, then, interpretive rules would become virtually indistinguishable from legislative rules.

Anthony, *Which Agency Interpretations Should Get Judicial Deference?*, *supra*, at 134 (1988).[5]

And quite contrary to the Secretary's argument here, this Court has, at his urging, expressly characterized the result of his reasonable interpretation of a legislative rule—in a mere charging document—as "lawmaking," the product of which must be law. *See Martin v. OSHRC*, 499 U.S. 144, 151, 153, 157 (1991) (describing the Secretary's "delegated

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[5] *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 628 (1996) (with *Auer* deference, "[a]n agency can . . . bind the court and the parties"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 569 (2000) (opining that the D.C. Circuit's view "may have been influenced by . . . [the requirement] to confer *Chevron* deference on an interpretative rule").

lawmaking powers" and "interpretive lawmaking power").[6]

Inasmuch as *Auer* confers on interpretive rules the force and effect of law characteristic of legislative rules, such rules may not be amended except as legislative rules are, *i.e.*, after notice and opportunity for public comment. So long as the federal courts are required to afford *Auer* deference to interpretative rules—and to thereby bind courts and citizens—the D.C. Circuit's holding should stand. No other result would vindicate Congress's command that agencies make law only through notice-and-comment rulemaking. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03, 312-15 (1979). The "power to make law depends upon using the *procedure and format* that Congress has specified for making law, usually notice-and-comment." Anthony, *The Supreme Court and the APA*, *supra* note 4, at 11 n. 29 (emphasis in original).

Although *amicus* would submit that *Auer* is inconsistent with the separation of powers required by the Constitution,[7] inconsistent with Congress's intent that judicial review of interpretive rules under the APA be "plenary,"[8] and inconsistent with the text and

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[6] *See also* Anthony, *The Supreme Court and the APA*, *supra* note 4, at 20-23 (criticizing *Martin*'s reliance on the charging document and opining that *Martin* "represents an even more abject deference . . . than acceptance of completed actions based upon agency documents that interpret regulations").

[7] *See* Manning, *supra* note 5.

[8] *See* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., 2d Sess., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46,

legislative history of the APA's judicial review provision,[9] and although *amicus* would submit that

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S. DOC. NO. 248 ("APA LEG. HIST."), at 18 (1946) (exemption from notice and comment because, *inter alia*, "'interpretative' rules . . . are subject to plenary judicial review"); FINAL REP. OF ATT'Y GENERAL'S COMM. ON ADMIN. PROC. 27 (1941) (stating that "the courts "will be influenced though not concluded by" interpretive rules); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (administrative rulings, interpretations and opinions are "not controlling upon the courts" but may have "power to persuade"); Robert A. Anthony and Michael Asimow, *The Court's Deferences – A Foolish Inconsistency*, 26 ADM. & REG. LAW NEWS 10-11 (2000) (*Auer* "contradicts the reason" for 5 U.S.C. § 553's interpretive-rule exception—"that such rules are subject to 'plenary judicial review'").

[9] *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998). Under 5 U.S.C. § 706 courts are, without distinction between constitutional and non-constitutional questions, to decide "all" questions of law, not just whether the agency's interpretation is "plainly erroneous." 5 U.S.C. § 706. Representative Francis Walter, author of H.R. REP. NO. 79-1980 (1946), APA LEG. HIST., *supra*, at 235, and a principal APA drafter, ATT'Y GENERAL'S MANUAL ON THE APA at 5 (1947) (speaking of the "McCarran-Sumners-Walter bill"), told the House that § 706 "requires courts to determine *independently* all relevant questions of law . . . ." APA LEG. HIST., *supra*, at 370 (emphasis added). *See also* S. REP. NO. 79-752, at 30 (1945) ("[Q]uestions of law are for the courts rather than agencies to decide in the last analysis . . . ."), *reprinted in* APA LEG. HIST., *supra*, at 214; H.R. REP. NO. 79-1980, at 44 (1946), APA LEG. HIST. at 278 (same). Although it has been said that courts "do not ignore that command when we afford an agency's statutory interpretation *Chevron* deference; we respect it," *City of Arlington v. FCC*, 133 S.Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting), a court would not decide "all" questions of law, or act independently, if it treated the agency as "the authoritative interpreter," *Nat'l Cable & Telecomms. Assn. v Brand X Internet Servs.*, 545 U.S. 967, 983 (2005), or limited its

Auer should be overruled for the reasons stated in *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part), no party has so requested and the Court has not invited briefs on that issue. Accordingly, the judgment of the Court of Appeals should be affirmed.

CONCLUSION

For the reasons provided above, this Court should affirm the decision below.

Respectfully submitted,

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inquiry to the reasonableness rather than the correctness of the agency's view. *See* Duffy, *supra*, at 196 (under *Chevron*, a court "does not itself *decide* the meaning of the statute; it determines only that the statute is ambiguous and then allows the agency to determine meaning") (emphasis in the original).

AMICUS CURIAE BRIEF

Nos. 13-1041 and 13-1052

In The Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.,
Respondents.

JEROME NICKOLS, ET AL.,
Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* UTILITY AIR REGULATORY GROUP AND AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 2

BACKGROUND 4

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. *Paralyzed Veterans* Is Consistent with the APA 10

II. As an Alternative to Upholding *Paralyzed Veterans*, the Court Should Overturn *Seminole Rock* 15

III. An Agency's Interpretation of Its Own Legislative Rule Is Not An Interpretative Rule Within the Meaning of the APA 17

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Federal Cases:

AD Transp. Express, Inc. v. *United States*, 290 F.3d 761 (6th Cir. 2002) 10

Alabama Tissue Ctr. of the Univ. of Ala. Health Serv. Found., P.C. v. *Sullivan*, 975 F.2d 373 (7th Cir. 1992) 22

Allen v. *Bergland*, 661 F.2d 1001 (4th Cir. 1981) 22

Auer v. *Robbins*, 519 U.S. 452 (1997) 15

Bailey v. *Sullivan*, 885 F.2d 52 (3d Cir. 1989) 22

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 7, 9, 15, 24, 25, 27, 28

Brown Express, Inc. v. *United States*, 607 F.2d 695 (5th Cir. 1979) 22

Chamber of Commerce of the United States v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980) 22

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 24

Chisholm v. *FCC*, 538 F.2d 349 (D.C. Cir. 1976) 8

Christopher v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) 25

Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 4, 22

Community Nutrition Inst. v. *Young*, 818 F.2d 943 (D.C. Cir. 1987) 8

Decker v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) 9, 16, 17

Dismas Charities, Inc. v. *U.S. Dep't of Justice*, 401 F.3d 666 (6th Cir. 2005) 22

Farmers Tel. Co. v. *FCC*, 184 F.3d 1241 (10th Cir. 1999) 22

Geier v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000) 3

Gunderson v. *Hood*, 268 F.3d 1149 (9th Cir. 2001) 22

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 16

Martin v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) 28

McKenzie v. *Bowen*, 787 F.2d 1216 (8th Cir. 1986) 22

Mendoza v. *Perez*, 754 F.3d 1002 (D.C. Cir. 2014) 10

Mortgage Bankers Ass'n v. *Harris*, 720 F.3d 966 (D.C. Cir. 2013) 12, 13

National Family Planning & Reproductive Health Ass'n v. *Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) 3, 4, 13

Noel v. *Chapman*, 508 F.2d 1023 (2d Cir. 1975) 8

Norton v. *S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) 5

Pacific Gas & Elec. Co. v. *Fed. Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974) 8

Paralyzed Veterans of Am. v. *D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied *sub nom.*, *Pollin* v. *Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998) 2, 3, 4, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17

Powderly v. *Schweiker*, 704 F.2d 1092 (9th Cir. 1983) 10

Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 10, 22

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) ... 16, 24

Stinson v. *United States*, 508 U.S. 36 (1993) 25

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 25

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 16, 24

United States v. *Mersky*, 361 U.S. 431 (1960) 21

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 4

Warder v. *Shalala*, 149 F.3d 73 (1st Cir. 1998) 22

Warshauer v. *Solis*, 577 F.3d 1330 (11th Cir. 2009) 22

White v. *Shalala*, 7 F.3d 296 (2d Cir. 1993) 22

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* 2

5 U.S.C. § 551(4) 4, 21

5 U.S.C. § 551(5) 5, 11

5 U.S.C. § 553 ..... 3, 6, 8, 9, 10, 11, 12, 17, 21, 24, 26, 28

5 U.S.C. § 553(a) 5

5 U.S.C. § 553(b) 5

5 U.S.C. § 553(c) 5

Legislative History:

Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. (1945), *reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT 1935-1946 LEGISLATIVE HISTORY at i-137 (1946) 26, 27

FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 18, 19, 22, 27

Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, Seventy-Seventh Congress First Session on S. 674, S. 675 and S. 918, Part 1, April 2 to 29, 1941, reprinted in 2 ADMINISTRATIVE PROCEDURE ACT 1935-1946 at 300-1418 (1946) ..... 18, ... 19, 20, 24

Proceedings from Congressional Record of March 12, 1946, Administrative Procedure, *reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79th Cong., 1944-1946 at 295-424 (1946) (statement of Sen. Pat McCarran, Chairman, S. Judiciary Comm.) 20, 21, 23

Senate Judiciary Committee Print, June 1945, reprinted in 1 ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-1946 at 11-46 (1946) 18, 19, 23

Regulation:

29 C.F.R. pt. 541 ..... 12, 13

Miscellaneous:

Asimow, Michael, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381-426 (1985) 13

Lewis, K.M., Note, *Text(Plus-Other-Stuff)ualism: Textualists' Perplexing Use of the Attorney General's Manual on the Administrative Procedure Act*, 1 MICH. J. ENVTL. & ADMIN. L. 287-317 (2012) 5, 28

U.S. Department of Justice, "Attorney General's Manual on the Administrative Procedure Act" (1947) 5, 6, 18, 19, 20, 21, 22, 28

INTEREST OF *AMICI CURIAE*

The Utility Air Regulatory Group (UARG) is an *ad hoc* unincorporated association of individual electric generating companies and industry groups.[1] The members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. These facilities are extensively regulated under legislative rules promulgated by the U.S. Environmental Protection Agency under the Clean Air Act (CAA). UARG's purpose is to participate on behalf of its members collectively in CAA proceedings, including rulemakings, that affect the interests of electric generators, and in litigation relating to those proceedings.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative – Better Practices, Better Planet 2020. The forest products industry accounts

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

for approximately four percent of the total U.S. manufacturing Gross Domestic Product, manufactures approximately $210 billion in products annually, and employs nearly 900,000 men and women.

The members of UARG and the AF&PA rely on compliance with the regulatory requirements adopted by federal agencies to ensure that their actions and operations do not subject them to liability. The principles of administrative law governing the promulgation of agency rules and their interpretation that were at issue in *Paralyzed Veterans of America* v. *D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied *sub nom.*, *Pollin* v. *Paralyzed Veterans of America*, 523 U.S. 1003 (1998), principles which petitioners would have this Court repudiate, are important to the interests of the members of UARG and the AF&PA.

All parties have consented to the filing of this brief.

INTRODUCTION

The federal petitioners describe the sole issue before this Court as whether, under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (APA or the Act), a "federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation." Brief for the Federal Petitioners (Fed. Br.) at I. The private petitioners are in accord, asking whether agencies subject to the APA are "categorically prohibited from revising their interpretative rules unless such revisions are made

through notice-and-comment rulemaking." Brief for Petitioners (Pet'rs Br.) at i.

The answer to these questions (which petitioners presume must be "no") is beside the point. At issue in this case is (1) whether every agency statement that purports to "interpret" an agency's own legislative rule is an "interpretative rule" within the meaning of 5 U.S.C. § 553 – it is not – and (2) whether an agency statement that would fundamentally change the meaning of a legislative rule to which the agency has given a definitive interpretation is an amendment to the rule subject to notice-and-comment requirements – it is.

Petitioners' questions are predicated on their misreading of the *Paralyzed Veterans* decision and on a misunderstanding of what the APA provides. *Paralyzed Veterans* reflects the straightforward application of basic APA principles, as some members of this Court have previously recognized. See *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 912 (2000) (Stevens, J., dissenting on other grounds) (citing *Paralyzed Veterans* for the proposition that the APA "require[s] ... new rulemaking when an agency substantially modifies its interpretation of a regulation").[2]

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[2] In his separate opinion, which Justices Souter, Thomas, and Ginsburg joined, Justice Stevens also cited for this proposition *National Family Planning & Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992), a decision on which *Paralyzed Veterans* had itself relied. In *National Family Planning*, the D.C. Circuit observed that the APA's "notice and comment guarantees would not be meaningful if an agency

This Court should reject petitioners' invitation to repudiate *Paralyzed Veterans*, which is neither inconsistent with the APA nor a "'departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" Fed. Br. at 12, quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). The Court should instead attest to the correctness of *Paralyzed Veterans* and affirm the judgment of the court of appeals below.

BACKGROUND

The APA defines "rule," in relevant part, to mean "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ...." 5 U.S.C. § 551(4). Under this definition, legislative rules are those rules that "implement ... or prescribe law."[3]

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could effectively, constructively amend regulations by means of nonobvious readings without giving the affected parties an opportunity ... to affect the content of the regulations at issue ...." *Id.* at 240 (internal quotation marks and citation omitted).

[3] The APA uses the term "substantive rule" rather than "legislative rule." The term "substantive rule" has been found to be equivalent to "legislative rule." See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-03 (1979) (equating "substantive" and "legislative-type" rules). This brief uses the term "legislative rule," except where quoting or referencing the APA's usage. Further, while the APA uses the term "interpretative rule," this brief (following the recent practice of this Court) employs the spelling "interpretive," except where quoting or referencing the APA.

Because legislative rules have the force of law, the public is afforded the right to participate in an agency's development of such rules through the notice-and-comment "rule making" procedures of 5 U.S.C. § 553(a)-(c).[4] By contrast, "interpretative rules," which do not "implement ... or prescribe law," are exempt from this notice-and-comment requirement. See *id.* § 553(b) ("Except when notice or hearing is required by [other] statute, this subsection does not apply – ... to interpretative rules ....").

In the determining the meaning of "substantive rule" and "interpretative rule," as those terms are used under the APA, courts have sought guidance from the U.S. Department of Justice's "Attorney General's Manual on the Administrative Procedure Act" (1947) (APA Manual), a document which was issued shortly after the APA was enacted and "whose reasoning [this Court has] ... often found persuasive." See *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004).[5] In a footnote, the APA Man-

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[4] The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

[5] But cf. K.M. Lewis, Note, *Text(Plus-Other-Stuff)ualism: Textualists' Perplexing Use of the Attorney General's Manual on the Administrative Procedure Act*, 1 MICH. J. ENVTL. & ADMIN. L. 287, 295 (2012) (Lewis, *Text(Plus-Other-Stuff)ualism*) (suggesting that the APA Manual may be "neither an authoritative nor accurate guide to the meaning of contested provisions of the APA," insofar as it was "written to advance the interests of the Executive Branch," and is "arguably unreliable when it advances a pro-executive point of view." (internal quotation marks and footnote omitted)).

ual offered what it called "working definitions" of "substantive rules" and "interpretative rules." APA Manual at 30 n.3. The former were described, in relevant part, as "rules ... issued by an agency pursuant to statutory authority and which implement the statute ...." *Id.* "Such rules," the APA Manual added, "have the force and effect of law." *Id.* As for "interpretative rules," the APA Manual described these as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.*

SUMMARY OF ARGUMENT

The D.C. Circuit's *Paralyzed Veterans* decision is not in any way inconsistent with the APA. Fundamental to Congress's purpose in enacting the APA is that the public be given the opportunity (through the notice-and-comment process) to participate in the development of agency pronouncements having the force and effect of law. *Paralyzed Veterans* vindicates this fundamental principle.

Petitioners condemn *Paralyzed Veterans* on the flawed assumption that each and every agency statement that purports to "interpret" a legislative rule necessarily constitutes an "interpretative rule" within the meaning of 5 U.S.C. § 553. On account of this flaw, petitioners devote the entirety of their briefing arguing a proposition – *i.e.*, that the APA does not require that an agency engage in notice-and-comment rulemaking in order to make or revise an "interpretative rule" – that is not in dispute and, ultimately, is not relevant to this case.

As the term has been uniformly construed by courts over the years, an "interpretative rule" under the APA serves merely to "clarify" or "explain" *existing* law. In *Paralyzed Veterans*, the D.C. Circuit recognized that, where an agency has given a definitive interpretation to one of its own legislative rules, a subsequent statement by the agency that would give a new and different meaning to that rule is not an interpretive rule. This subsequent statement would neither clarify nor explain existing law but would *change* existing law. Because such a statement would amend the legislative rule itself, the APA's notice-and-comment requirements apply. The application of *Paralyzed Veterans* in the case below was correct, and this Court should affirm the judgment of the court.

At the same time, this case serves as a reminder to the Court that, as some members have already suggested, the time has come for the Court to consider whether the limitations imposed on judicial review of agency interpretations of legislative rules by *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and its progeny should now be abandoned. *Paralyzed Veterans* is an attempt on the D.C. Circuit's part (and one consistent with basic APA principles) to redress some of the harm that *Seminole Rock* has been inflicting over the course of nearly 70 years. So long as *Seminole Rock* remains the law, then *Paralyzed Veterans* should itself remain the law. If this Court is not inclined to affirm *Paralyzed Veterans*, then it should overrule *Seminole Rock*.

Finally, the Court can affirm the judgment of the court below on the alternative grounds that *no* agency statement that purports to interpret a legislative rule constitutes an "interpretative rule" within the meaning of 5 U.S.C. § 553. Contrary to what courts (including this Court) have long supposed, there is no indication whatsoever that Congress intended "interpretative rule," as that term is employed by the APA, to include anything other than an agency's interpretation of a statutory provision. Against the backdrop of this Court's decision in *Seminole Rock*, the rationale Congress gave for exempting statutory interpretations from the APA's notice-and-comment requirements does not justify an agency's interpretation of a legislative rule being similarly exempt.

ARGUMENT

For decades, courts have twisted themselves into knots trying to come to grips with the distinction the APA draws between legislative rules and interpretive rules. See, *e.g.*, *Cmty. Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (*per curiam*) (noting that the "distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' *Chisholm* v. *FCC*, 538 F.2d 349, 393 (D.C. Cir. [1976]), ... 'fuzzy,' *Pac. Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), ... and, perhaps most picturesquely, 'enshrouded in considerable smog.' *Noel* v. *Chapman*, 508 F.2d 1023, 1030 (2d Cir. [1975])"). Fortunately, the Court is not obliged

to trod across this particular patch of smoggy terrain in order to resolve the case at hand.

Instead, presented here is a distinctly different question, one that has rarely (if ever) been asked: does *every* agency statement that purports to "interpret" a legislative rule constitute an "interpretative rule" within the meaning of 5 U.S.C. § 553? For its part, the D.C. Circuit in *Paralyzed Veterans* identified a discrete category of agency statements that are not interpretive rules but, rather, represent an attempt by the agency to amend a legislative rule without satisfying its notice-and-comment obligations. As is explained in section I below, *Paralyzed Veterans* is consistent with basic APA principles, and the Court should decline the petitioners' invitation to repudiate that decision.

Section II argues that, as an alternative to upholding *Paralyzed Veterans*, the Court should overrule *Seminole Rock*. Some on the Court have recently suggested that the time has come to set aside the *Seminole Rock* doctrine. See *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring), 1339 (Scalia, J., concurring in part and dissenting in part).

Finally, section III explains that this Court can also affirm the decision of the court of appeals below on the alternative grounds that the exemption from notice-and-comment requirements that the APA provides for "interpretative rules" applies only to agency interpretations of *statutory* provisions. An interpretation which an agency may offer of one of its own

legislative rule is not properly understood to be an "interpretative rule" within the meaning of 5 U.S.C. § 553 at all.

I. *Paralyzed Veterans* Is Consistent with the APA.

Key to this case – and dispositive of the petitioners' attempt to have this Court set aside *Paralyzed Veterans* – is that courts have consistently construed "interpretative rules" under the APA to be agency statements which "merely clarify or explain *existing* law or regulations." See, *e.g.*, *Powderly* v. *Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983) (emphasis added); accord *Mendoza* v. *Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (interpretive rules "remind parties of *existing* statutory or regulatory duties, or merely track[] *preexisting* requirements and explain something the statute or regulation *already required*" (internal quotation marks omitted) (emphases added)); *AD Transp. Express, Inc.* v. *United States*, 290 F.3d 761, 768 (6th Cir. 2002) (a "rule is interpretative if it merely explains what the more general terms of the Act and regulations *already provide*" (internal quotation marks omitted) (emphasis added)); cf. *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 111 (1995) ("interpretive rules are exempt from the notice and comment provisions" of the APA, but "they *must explain existing law* and *not contradict* what the regulations require." (emphases added)) (O'Connor, J., dissenting).

In other words, an agency statement regarding the meaning of one of its own legislative rules is an

"interpretative rule" within the meaning of the APA – and thus exempt from the notice-and-comment requirements of 5 U.S.C. § 553 – if that statement does no more than set forth the agency's view as to the rule's existing meaning. *Paralyzed Veterans* addressed an altogether different sort of agency statement, one in which the agency sought to make a "fundamental change" to its prior definitive interpretation of the rule at issue. See *Paralyzed Veterans*, 117 F.3d at 586. While the agency was free to change its interpretation of the rule, the D.C. Circuit explained, it could do so "only ... as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* "Under the APA," the D.C. Circuit pointed out, "agencies are obliged to engage in notice and comment before formulating regulations," and this requirement "applies as well to 'repeals' or 'amendments.'" *Id.*, quoting 5 U.S.C. § 551(5) (emphases omitted). To "allow an agency" to forego "notice and comment" in this specific circumstance, the D.C. Circuit reasoned, "would undermine those APA requirements." *Id.*

Petitioners' complaint that *Paralyzed Veterans* runs afoul of the APA makes sense only if one assumes that the agency statement the D.C. Circuit was addressing constituted an "interpretative rule" within the meaning of 5 U.S.C. § 553. No such assumption is possible. An agency statement that would work a "fundamental change" to the agency's own prior understanding of the meaning of its legislative rule is not clarifying or explaining the "existing law." The key point is, in such circumstances,

the "existing law" is the legislative rule as previously (and definitively) interpreted by the agency. Any subsequent agency statement that would give the legislative rule a new (and different) meaning is not a clarification or an explanation but, rather, is a change to existing law. This sort of agency statement cannot be considered an "interpretative rule" and, thus, the exemption that 5 U.S.C. § 553 provides for such rules does not apply.

The case at hand provides a stark illustration of this principle. In 2006, the U.S. Department of Labor's Wage and Hour Division issued a formal "Opinion Letter," in which the Division set forth an interpretation of a legislative rule (codified at 29 C.F.R. Part 541) that the Department had adopted to implement the Fair Labor Standards Act's provisions governing exemptions for overtime pay requirements. As relevant here, the effect of the 2006 Opinion Letter was that mortgage loan officers were classified as "exempt" employees. See *Mortgage Bankers Ass'n* v. *Harris*, 720 F.3d 966, 968 (D.C. Cir. 2013). In 2010, the Division issued an "Administrator's Interpretation" (2010 AI) which "explicitly withdrew" the 2006 Opinion Letter and provided a *new* interpretation of 29 C.F.R. Part 541, under which mortgage loan officers would *not* be classified as exempt. *Id.*

A rule cannot have two diametrically opposed meanings at the same time. The 2010 AI was not an "interpretative rule" within the meaning of 5 U.S.C. § 553. It did not serve to "clarify" or "explain" exist-

ing law. At the time the 2010 AI was issued, the "existing law" – *i.e.*, the provisions of 29 C.F.R. Part 541, as interpreted by the 2006 Opinion Letter – was that mortgage loan officers were deemed to be "exempt" employees. Under the 2010 AI, the provisions of 29 C.F.R. Part 541 were construed so that those very same mortgage loan officers were deemed *not* to be "exempt." This was a change to the existing law, not a clarification or explanation of it. Surely, at a minimum, had the 2010 AI been a true clarification or explanation, exempt employees would have remained exempt. Cf. *Nat'l Family Planning*, 979 F.2d at 237 (a "rule which 'effect[s] a change in existing law or policy' is legislative") (citation omitted).

The D.C. Circuit noted that, if the Department of Labor wished to adopt the "later-in-time interpretation, it [was] free to." *Mortgage Bankers Ass'n*, 720 F.3d at 968. Invoking *Paralyzed Veterans*, the court specified, however, that the Department "must ... conduct the required notice and comment rulemaking" in order to accomplish this change. *Id.* In so deciding, the D.C. Circuit imposed no new "judge-made procedural requirement," Fed. Br. at 10, but only pointed out what the APA itself demands. See *Nat'l Family Planning*, 979 F.2d at 235 ("It is a maxim of administrative law that: 'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.' Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396.").

The petitioners perceive an anomaly in *Paralyzed Veterans*, insofar as the decision allows "for an agency's initial formulation of an interpretive rule to occur without notice-and-comment rulemaking," while "holding that notice-and-comment rulemaking is necessary to amend or repeal the same interpretive rule." Fed. Br. at 31. Petitioners contend that, in this regard, *Paralyzed Veterans* "disregards" the APA's "rulemaking symmetry." *Id.*

There is no anomaly, and the APA's "symmetry" is preserved. The *first* time an agency issues a statement giving a definitive interpretation to one of its legislative rules, the agency is engaged in true "interpretive" rulemaking. In such a setting, the agency statement presumably clarifies or explains existing law – *i.e.*, the "existing law" being the legislative rule with ambiguous or indeterminate language for which no interpretation has yet been issued by the agency. Notice-and-comment is not required because this initial interpretation is not changing the meaning of the rule. Thereafter, the "existing law" is comprised of the legislative rule as it has been definitively interpreted. If some subsequent agency statement sets forth a different interpretation, notice-and-comment procedures will be required, as that subsequent statement is not clarifying or explaining what current law provides but, rather, seeks to change the law.

In sum, *Paralyzed Veterans* is consistent with and, indeed, vindicates basic APA principles. The

Court should affirm the correctness of the D.C. Circuit's reasoning.

II. As an Alternative to Upholding *Paralyzed Veterans*, the Court Should Overturn *Seminole Rock*.

In enacting the APA, Congress intended that the public be given notice of, and be provided the opportunity to participate in, the development of agency pronouncements that would have the force and effect of law. *Seminole Rock*, however, operates to give the force of law to agency interpretations that evade the notice-and-comment process that Congress had envisioned. See *Seminole Rock*, 325 U.S. at 414 (in "choosing between various constructions" of a rule's language, the "ultimate criterion is the administrative interpretation, which become of *controlling weight* unless it is plainly erroneous or inconsistent with the regulation.") (emphasis added). Accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

Paralyzed Veterans can thus be viewed as a modest effort on the part of the D.C. Circuit to address this problem in one narrow context, involving as it does only the (rarefied) situation where an agency is found to have given a definitive interpretation to one of its legislative rules, and thereafter seeks to give a wholly different meaning to the rule without undergoing notice-and-comment. An alternative to upholding *Paralyzed Veterans* is for the Court to overturn *Seminole Rock* and hold that if an agency interprets its rules outside the notice-and-comment process, that interpretation is entitled to no more weight than

is due to an agency statutory interpretation made outside the notice-and-comment process or in some other context where Congress did not "contemplate[] administrative action with the effect of law." See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). Such interpretations are entitled only to that "respect" which is "proportional to its 'power to persuade.'" *Id.* at 235, quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

That is, consistent with their constitutional responsibility to "'say what the law is,'" see *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), courts would in the first instance determine what a legislative rule means. In a given case, the agency's interpretation (whether it be the first, second, or even the seventeenth) would not be given "controlling weight," but would, at most, be given only such weight as the "thoroughness evident in [the agency's] consideration," the "validity of its reasoning," its "consistency with earlier and later pronouncements," and "all those factors which give it power to persuade, if lacking power to control," the interpretation might be found to command. See *Skidmore*, 323 U.S. at 140. No longer would agency "interpretive" statements, made without notice-and-comment, be given the force and effect of law, an attribute which Congress only ever intended that "substantive rules" should possess.

In short, underpinning *Paralyzed Veterans* is the understanding that the "purpose of interpretation" is

not to "make the regulatory program work in a fashion that the current leadership of the agency deems effective," but, rather, to "determine the fair meaning of the rule" – *i.e.*, not to "make policy, but to determine what policy *has been made* and promulgated by the agency, to which the public owes obedience." See *Decker*, 133 S. Ct. at 1340 (emphasis added) (Scalia, J., concurring in part and dissenting in part).

At a minimum, the D.C. Circuit's reasoning in *Paralyzed Veterans* should be affirmed by this Court. In the alternative, the Court should overrule *Seminole Rock*. An agency's action in interpreting (and reinterpreting) its own rules cannot be exempt from the APA's notice-and-comment requirements, on the grounds that an "interpretative rule" is without binding effect, while at the same time that interpretation is given "controlling weight." "Enough is enough." *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part).

III. An Agency's Interpretation of Its Own Legislative Rule Is Not An Interpretative Rule Within the Meaning of the APA.

Alternatively, this Court can affirm the judgment below on the grounds that the exemption from the notice-and-comment requirements of 5 U.S.C. § 553 that the APA provides for "interpretative rules" does not apply to an agency statement that purports to interpret the agency's own legislative rule. There is no reason to suppose that Congress, in enacting the APA, intended that "interpretative rules" should in-

clude such agency statements. There are good reasons to conclude that Congress did not so intend.

As was previously noted, while the APA employs the term "interpretative rule," Congress did not include a definition of the term. Courts have for decades, therefore, resorted to the "working definition" of the term set forth in the APA Manual. For its part, the APA Manual cited three specific items of APA legislative history in support of its post-enactment definition.[6] Notably, *none* of the items on which the APA Manual relied for its assertion that "interpretative rules" include statements intended to "advise the public of the agency's construction of the ... rules" which the agency "administers" mentioned agency "rules" at all. Instead, those cited portions of legislative history described "interpretative rules" solely as those agency statements that interpret or construe *statutory* provisions.

For example, the Final Report explained that "[m]ost agencies find it useful from time to time to

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[6] Those three items were (1) page 27 of the FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) (Final Report); (2) page 6 of the *Senate Judiciary Committee Print, June 1945, reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79TH CONG., 1944-1946 (APA LEG. HISTORY) at 18 (1946) (Senate Comparative Print); and (3) page 330 of the *Hearings Before a Subcommittee of the Committee of the Judiciary, United States Senate, Seventy-Seventh Congress First Session on S. 674, S. 675 and S. 918, Part 1, April 2 to 29, 1941, reprinted in* 2 ADMINISTRATIVE PROCEDURE ACT 1935-1946 at 300 (Senate Hearings). See APA Manual at 30 n.3.

issue interpretations of the *statutes under which they operate*," and that "[t]hese interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of *applicable statutory language*." Final Report at 27 (emphases added).[7]

Similarly, the Senate Comparative Print explained that the reason why the proposed legislation excluded "interpretative rules" from the notice-and-comment requirement was that "'interpretative' rules" were *merely interpretations of statutory provisions*" and thus were "subject to plenary judicial review." Senate Comparative Print at 18 (emphasis added).

As for the third item cited by the APA Manual – *i.e.*, a portion of the hearings held before a subcommittee of the Senate Judiciary Committee in 1941 – page 330 of the record of those hearings included the following testimony given by Robert Healy, the then-General Counsel of the Federal Trade Commission:

> We have two classes of rules outside of the merely procedural rules .... They may be roughly divided as interpretive rules and what may be called legislative rules.

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[7] Federal petitioners (selectively) quote this same language from page 27 of the Final Report, placing quotation marks after the word "meaning," omitting the words "of applicable statutory language," and then adding their own words "... of the statutes and legislative rules ...." See Fed. Br. at 21. The private petitioners do something similar. See Pet'rs Br. at 8.

> As I see an *interpretive rule*, it is a rule in which the Commission, in formal fashion, states its opinion as to what the *statute* means.

Senate Hearings at 330 (emphases added). Mr. Healy went on to explain that "[t]hat expression, of course, is not binding on the courts, because the last word as to the meaning of words *in a statute* rests with the court, but it is a guide and a help to those who do business with us ...." *Id.* at 331 (emphasis added). Mr. Healy appears to have said nothing about agency interpretations of their own legislative rules as also being a type of "interpretive rule."

In short, if there is anything in the legislative history of the APA to support the APA Manual's position that Congress intended the term "interpretative rule" to include an agency's interpretation of its *own rules*, the APA Manual does not identify it. At the same time, there are further examples from the APA's legislative history that indicate that, by "interpretative rules," Congress had in mind only *statutory* interpretations made by agencies. See, *e.g.*, Proceedings from Congressional Record of March 12, 1946, Administrative Procedure, *reprinted* APA LEG. HISTORY at 313 (1946) (statement of Sen. Pat McCarran, Chairman, S. Judiciary Comm.) (McCarran Statement) (the "pending bill exempts from its procedural requirements all interpretative ... rules, because under present law interpretative rules, *being merely adaptations of interpretations of statutes*, are

subject to a more ample degree of judicial review ...." (emphasis added)).

On its face, the plain language of the APA does not itself communicate an intent on Congress's part that an "interpretative rule" should be understood to include an agency's interpretation of its own legislative rules. As was noted, the APA defines "rule," in relevant part, to mean "an agency statement ... designed to ... interpret ... law or policy." 5 U.S.C. § 551(4). While this language undoubtedly embraces an agency's interpretation of a congressionally-enacted statutory provision, it is less obvious that Congress in 1946 intended that the words "to ... interpret ... *law*" were also to include an agency's interpretation of its own legislative rules – *i.e.*, agency-promulgated provisions that may at best be described as having the "force and effect of law." Cf. APA Manual at 30 n.3; see also *United States* v. *Mersky*, 361 U.S. 431, 437 (1960) ("An administrative regulation, of course, is not a 'statute,'" and "[w]hile in practical effect regulations may be called 'little laws,' they are at most but offspring of statutes." (footnote omitted)).

In any event, regardless whether the Attorney General in 1947 had any solid basis for construing "interpretative rule," as that term in used in 5 U.S.C. § 553, to include "rules or statements issued by agency to advise the public of the agency's construction of the ... rules which it administers," APA Manual at 30 n.3, it would appear that courts – including this

Court[8] – have presumed such to be the case. See, *e.g.*, *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980); *Warder* v. *Shalala*, 149 F.3d 73, 79 (1st Cir. 1998); *White* v. *Shalala*, 7 F.3d 296, 303 (2d Cir. 1993); *Bailey* v. *Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989); *Allen* v. *Bergland*, 661 F.2d 1001, 1007 (4th Cir. 1981); *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 700 (5th Cir. 1979); *Dismas Charities, Inc.* v. *U.S. Dep't of Justice*, 401 F.3d 666, 679 (6th Cir. 2005); *Ala. Tissue Ctr. of the Univ. of Ala. Health Serv. Found., P.C.* v. *Sullivan*, 975 F.2d 373, 377 (7th Cir. 1992); *McKenzie* v. *Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986); *Gunderson* v. *Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001); *Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999); *Warshauer* v. *Solis*, 577 F.3d 1330, 1338 (11th Cir. 2009). The petitioners presume so as well. It may not be a sound presumption.

The reasons Congress gave for allowing agencies to forego notice-and-comment procedures in the making of "interpretative rules" pertained only to an agency interpretation of a *statutory* provision. The 1941 Final Report, for instance, explained that "interpretative rules" that set forth agency "interpretations of the statutes under which they operate" were "ordinarily of an advisory character" only and were

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[8] In *Guernsey Memorial Hosp.*, 514 U.S. at 99, this Court cited without discussion its earlier decision in *Chrysler Corp.*, 441 U.S. at 302 n.31, in which the Court had quoted (again, without discussion) the APA Manual's "working definition" of "interpretative rules."

"*not binding* upon those affected." Final Report at 27 (emphasis added). This was so because "if there is disagreement with the agency's view, the question may be presented for determination by a court." *Id.* While the "agency's interpretations ... customarily ... are accepted as determinative by the public at large," the Final Report added, "if they are challenged in judicial proceedings," the reviewing court "will be influenced though not concluded by the administrative opinion." *Id.*

The 1945 Senate Comparative Print made a similar observation. Public participation (through notice-and-comment) in the making of agency interpretive rules was deemed "unnecessary," insofar as such rules, being "merely interpretations of statutory provisions," would be "subject to *plenary judicial review*." Senate Comparative Print at 18 (emphasis added).

In proceedings before the Senate in March 1946, one of the sponsors of the legislation that became the APA explained that, under the pending bill, notice-and-comment was not required for "interpretative rules," in that such agency statements, "being merely adaptations of interpretations of statutes," were "subject to a *more ample degree of judicial review*." McCarran Statement at 313 (emphasis added). This conforms to the testimony given before a subcommittee of the Senate Judiciary Committee some years earlier, in which the witness explained that, when his agency "in formal fashion, states its opinion as to what the statute means," that opinion "of course, is

not binding on the courts, because the last word as to the meaning of words in a statute *rests with the court.*" Senate Hearings at 330-31 (emphasis added).[9]

In the case of an agency's interpretation of one of its own legislative rules, Congress's rationale for why "interpretative rules" should be exempt from notice-and-comment under 5 U.S.C. § 553 does not apply. This Court's decision in *Seminole Rock* operates to ensure that an agency's interpretation of one of its own legislative rules is *not* "subject to plenary judi-

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[9] Developments in this Court since enactment of the APA have not unsettled congressional expectations in this regard. In *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984), the Court held that statutory ambiguity represented an implicit delegation by Congress to the agency of authority to "elucidate a specific provision of the statute by regulation." In such a circumstance, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation" made by the agency. *Id.* at 844. Thereafter, in *Mead Corp.*, 533 U.S. at 226-27, the Court clarified that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference" only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and that the "agency interpretation claiming deference was promulgated in the exercise of that authority." The "overwhelming number of our cases applying *Chevron* deference," the Court observed, "have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230. A statutory interpretation that is not the product of the agency's exercise of such delegated authority, the Court held, is entitled only to so-called "*Skidmore* deference." *Id.* at 234-38. See *Skidmore* 323 U.S. at 140 (the "power to persuade" but not the "power to control").

cial review" and *is*, for all practical purposes, "binding on the courts." *Seminole Rock*, 325 U.S. at 414 (the "administrative interpretation ... becomes of *controlling weight* unless it is plainly erroneous or inconsistent with the regulation.") (emphasis added).

Under *Seminole Rock*, a court *must* give "controlling weight" to an agency's interpretation of its own legislative rule except in the rarest of circumstances.[10] Under the *Seminole Rock* regime, there is little if any meaningful distinction between a legislative rule and an agency's interpretation of the rule: as to what the rule means, how it applies to regulated en-

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[10] Such circumstances involve situations where the interpretation itself is found to be categorically unlawful. This includes (1) where "an alternative reading is *compelled* by the regulation's plain language," see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (emphasis added; internal quotation marks omitted); and (2) the agency's interpretation, while not inconsistent with the regulatory language, would (if applied) have the effect of rendering the rule inconsistent with the statute pursuant to which the rule was promulgated. See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (an agency interpretation "must be given controlling weight" per *Seminole Rock* "provided ... [the] interpretation ... does not violate the Constitution or a federal statute") (internal quotation marks omitted). More recently, this Court has indicated that an agency interpretation may not be given "controlling weight" where "potentially massive liability" would result on account of applying the agency's interpretation to conduct that occurred prior to the interpretation having been announced, resulting in "'unfair surprise'" and raising Due Process concerns. See *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

tities, and how a reviewing court should read the rule, what the agency says, goes.

That being the case, if the APA requires that notice-and-comment procedures be followed in the development of the rule, there would seem be no good reason why the agency's formulation of an "interpretation" of the rule should be excused from those same procedures. As was noted above, there is nothing on the face of the APA or its legislative history to indicate that, in exempting "interpretative rules" from the notice-and-comment requirement of 5 U.S.C. § 553, Congress had anything in mind other than agency interpretations of statutory provisions, interpretations which present no equivalent concerns.[11]

Regarding this, federal petitioners cite portions of an exchange between Carl McFarland, the then-chairman of the American Bar Association's Committee on Administrative Procedure, and Chairman of the House Judiciary Committee during a hearing on the APA, in which Mr. McFarland "made clear" his view that the "proposed statutory notice-and-comment procedure for 'the issuance of regulations ... should be limited to substantive regulations.'" Fed. Br. at 21-22, quoting *Administrative Procedure:*

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[11] See *supra* note 9 (discussing *Chevron* and *Mead*). Cf. Final Report at 27 (in the case of an interpretative rule setting forth an agency's interpretation of a statutory provision – which the agency could adopt without notice-and-comment – and that interpretative rule is "challenged in judicial proceedings," the reviewing court "will be influenced though not concluded by the administrative opinion").

Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. at 30 (1945) *reprinted in* 1 ADMINISTRATIVE PROCEDURE ACT 1935-1946 LEGISLATIVE HISTORY at 30 (1946) (House Hearings). What federal petitioners leave out this exchange provides more insight than the portions they include:

> MR. MCFARLAND. * * * * Incidentally, no proceeding ought to be required with respect to ... interpretative regulations ....
>
> THE CHAIRMAN. Mr. McFarland, let me interrupt you. *The interpretative regulations of substantive regulations become very definitely substantive.*
>
> MR. MCFARLAND. The interpretative?
>
> THE CHAIRMAN. The interpretative regulations of substantive regulations, *because the interpretation is what affects these people.*
>
> MR. MCFARLAND. That is right.

House Hearings at 30 (emphases added). Just so. With regard to agency interpretations of legislative rules, where subsequent judicial review is governed by *Seminole Rock*, the distinction between the "interpretation" and the "rule" essentially evaporates. The Committee Chairman was remarkably prescient: *Seminole Rock* had been handed down just two weeks before.

This Court "presume[s] that the power authoritatively to interpret its own regulations is a component

of [an] agency's delegated lawmaking powers." See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). If, in exercising its "delegated lawmaking powers" in formulating and promulgating a legislative rule, an agency must adhere to the APA's notice-and-comment requirements, why should the agency, where it seeks to "authoritatively ... interpret" that rule, be excused from meeting those same requirements?

This case provides the Court an opportunity to answer that question. It should instruct that, so long as *Seminole Rock* remains in place and, as a consequence, an agency's interpretation of its own rules is to be afforded "controlling weight," the making of such interpretations, like the making of legislative rules themselves, is subject to the notice-and-comment requirements of 5 U.S.C. § 553. Contrary to what (post-APA enactment) the APA Manual asserted,[12] and contrary to what has long been supposed, an "interpretative rule," as the APA employs the term, does not include an agency's interpretation of its own legislative rules. The Court can affirm the judgment below on this alternative basis.

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[12] Cf. Lewis, *Text(Plus-Other-Stuff)ualism* at 296 (questioning whether the APA Manual might be seen as a "post hoc attempt by the Executive Branch to interpret the APA in a manner beneficial to its interests").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 16, 2014

AMICUS CURIAE BRIEF

Nos. 13-1041, 13-1052

IN THE

Supreme Court of the United States

THOMAS E PEREZ, Secretary of Labor, *et al* ,
Petitioners,

v

MORTGAGE BANKERS ASSOCIATION, *et al* ,
Respondents

JEROME NICKOLS, *et al* ,
Petitioners,

v

MORTGAGE BANKERS ASSOCIATION,
Respondent

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In 2010, the U.S. Department of Labor issued an Administrator's Interpretation that reversed the department's previous position and held that mortgage loan officers are not "administrative" employees exempt from the overtime-pay requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The court of appeals vacated the 2010 Administrator's Interpretation, concluding that it was subject to, and had not been issued in accordance with, the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. The question presented is:

Whether the 2010 Administrator's Interpretation was an "interpretive" rule within the meaning of § 553(b) and thus exempt from § 553's notice-and-comment requirements.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. PETITIONERS MISCHARACTERIZE *PARALYZED VETERANS*; IT DOES NOT SEEK TO IMPOSE DUTIES ON AGENCIES THAT ARE NOT SET FORTH IN THE APA 10

II. AI 2010 WAS NOT AN "INTERPRETIVE RULE"; THUS, DOL ERRED IN FAILING TO COMPLY WITH § 553's NOTICE-AND-COMMENT REQUIREMENTS 15

A. A Rule Is "Interpretive" Only If It Does Not Have the Force and Effect of Law 15

B. AI 2010 Is a Substantive Rule Because It Has the Force and Effect of Law; Among Other Things, It Eliminates a Safe-Harbor Protection Previously Available to Employers 17

Page

C. AI 2010 Is a Substantive Rule Because, Under *Paralyzed Veterans*, It in Effect Has Amended DOL Regulations 22

III. THE *PARALYZED VETERANS* RULE DOES NOT INTERFERE WITH THE EFFICIENT OPERATION OF REGULATORY AGENCIES 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Alaska Professional Hunters Ass'n v. FAA,
177 F.3d 1030, 1034 (D.C. Cir. 1999) 5, 12, 13

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 12

Auer v. Robbins,
519 U.S. 452 (1997) 22

Carley v. United States,
556 U.S. 303 (2009) 21

Christensen v. Harris County,
529 U.S. 576 (2000) 14

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 8, 15, 16

Hudson v. FAA,
192 F.3d 1031 (D.C. Cir. 1999) 13, 27

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 16, 19, 22

MetWest Inc. v. Secretary of Labor,
560 F.3d 506 (D.C. Cir. 2009) 13, 27

Paralyzed Veterans of America v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) ..... *passim*

Page(s)

Shalala v. Guernsey Memorial Hospital,
514 U.S. 87 (1995) 14, 24, 28

Syncor Int'l Corp. v. Shalala,
127 F.3d 90 (D.C. Cir. 1997) 17

Vermont Yankee Nuclear Power Corp v. NRDC,
435 U.S. 519 (1978) 11

Statutes and Regulations:

Administrative Procedure Act (APA) ..... *passim*
5 U.S.C. § 551(5) 24
5 U.S.C. § 553 ..... *passim*
5 U.S.C. § 553(b) 4, 6
5 U.S.C. § 553(b)(A) 12
5 U.S.C. § 553(c) 4
5 U.S.C. § 706(2)(A) 6, 8
5 U.S.C. § 706(2)(D) 4

Fair Labor Standards Act (FLSA),
29 U.S.C. § 201, *et seq.* ..... *passim*
29 U.S.C. § 207 3
29 U.S.C. § 213 19
29 U.S.C. § 213(a)(1) 3, 20

Page(s)

Portal-to-Portal Act of 1947,
29 U.S.C. § 251 *et seq* 7, 18, 19
29 U.S.C. § 251 19
29 U.S.C. § 259 . . . . . 18, 19
29 U.S.C. § 259(a) 7, 8, 18, 19
29 U.S.C. § 259(b)(1) 19

29 C.F.R. § 541.200 . . . . . 20, 21

29 C.F.R. § 541.203 20

29 C.F.R. § 541.203(b) 21

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947) 15, 28

Food and Drug Administration, *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (2009) 27

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

In particular, WLF has regularly appeared in this and other federal courts in support of its belief that those outside the Executive Branch ought to have a meaningful opportunity to participate in the development of government policy by federal administrative agencies. *See, e.g., Shinseki v. Sanders*, 556 U.S. 396 (2009); *Am. Farm Bur. Fed'n v. EPA*, No. 13-4079 (3d Cir., dec. pending). In particular, WLF on a number of occasions has sought invalidation of federal rules because the promulgating agency failed to comply with the notice-and-comment requirements of the Administrative Procedure Act (APA). *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Prevor v. FDA*, ___ F. Supp. 3d ___, 2014 WL 4459174 (D.D.C., Sept. 9, 2014).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

as *amicus curiae* in this and other federal and state courts on a number of occasions.

Amici readily acknowledge the right of federal administrative agencies to revise their existing rules governing how they will carry out their statutory mandate, so long as the revised rules do not conflict with that mandate. But *amici* strongly support the public's right to participate in the revision process, participation that not only is consistent with our tradition of open government but also ensures that all potential revisions are well-considered. *Amici* view the D.C. Circuit's *Paralyzed Veterans* rule as an effective tool for distinguishing those rule revisions that are purely interpretative and do not have the force of law (and are thus exempt from the APA's notice-and-comment requirements) from substantive rule revisions that are subject to those requirements. The *Paralyzed Veterans* rule has been in effect for nearly 20 years, and *amici* believe that its effects on administrative rulemaking have been universally positive.

It is settled law that an agency seeking to amend a substantive rule must comply with the notice-and-comment rulemaking procedures set forth in 5 U.S.C. § 553. *Amici* are concerned that if the Court overturns the *Paralyzed Veterans* rule, some federal agencies will seek to evade that procedural requirement by adopting *de facto* amendments to substantive rules under the guise of merely "re-interpreting" those rules.

STATEMENT OF THE CASE

The facts of this case are set out in detail in

Respondents' brief. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

Section 7 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, grants employees the right to overtime pay, subject to certain exemptions. At issue here is § 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), which exempts from the overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to [applicable provisions of the APA]. . .)."

In 2004, the Department of Labor (DOL) revised its regulations regarding exemptions from the FLSA overtime requirements, including the regulations covering the exemptions for administrative employees. In 2006, in response to an inquiry from Respondent Mortgage Bankers Association (MBA), DOL issued a detailed Opinion Letter concluding that § 213(a)(1) and implementing regulations exempt mortgage loan officers from the overtime requirements. Pet. App. 70a-84a.[2] DOL published the Opinion Letter on its website and touted it as DOL's definitive interpretation of the 2004 regulations as applied to mortgage loan officers.

As described in Intervenors' brief, DOL's decision was heavily criticized by labor leaders and

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[2] Citations to the Petition Appendix refer to the petition appendix submitted in No. 13-1041.

others who favored broad application of the FLSA's overtime provisions. Soon after President Obama took office, DOL reversed course and declared *sua sponte* that mortgage loan officers were *not* exempt from the overtime provisions. That decision, set forth in an Administrator's Interpretation issued in 2010 ("AI 2010"), *id.* at 49a-69a, was based on the same facts—and on an interpretation of the same 2004 DOL regulations—as the 2006 Opinion Letter. The decision concluded that the Bush Administration officials responsible for issuing the 2006 letter had misinterpreted the regulations that they had issued just two years earlier. *Id.* at 68a. Because of what the decision described as the letter's "misleading assumption [regarding the meaning of the 2004 regulations] and selective and narrow analysis," AI 2010 stated that the Opinion Letter was being withdrawn. *Id.* at 68a-69a.

MBA thereafter filed suit against DOL, asserting *inter alia* that DOL's decision to reverse course regarding the overtime exemption was invalid because AI 2010 was issued "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). In particular, MBA asserted that DOL violated 5 U.S.C. § 553 by issuing its 2010 decision without first publishing "general notice of proposed rule making" and then giving "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b) & (c). The district court rejected that claim and dismissed the suit, concluding that notice-and-comment rulemaking was not required. Pet. App. 13a-48a. In particular, the court held that the D.C. Circuit's *Paralyzed Veterans* rule—named for the

appeals court's decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)—was inapplicable (and thus did not require notice-and-comment rulemaking), because the MBA could not demonstrate that its members had relied to their detriment on the 2006 Opinion Letter. *Id.* at 42a-44a.

The D.C. Circuit reversed and remanded with instructions to vacate AI 2010. *Id.* 1a-12a. The appeals court held that the district court erred when it incorporated a reliance requirement into the *Paralyzed Veterans* rule. *Id.* at 11a-12a. The court explained that rule as follows:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.

Id. at 2a (parenthetical in original) (quoting *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)). After determining both that the 2006 Opinion Letter was a "definitive interpretation" of the 2004 regulations and that AI 2010 "significantly revised" the legal analysis of the Opinion Letter without asserting any change of circumstances in the intervening years, the appeals court concluded that DOL had "effectively amended" the 2004 regulations and thus had violated the APA requirement that it engage in notice-and-comment rulemaking before amending its regulations. *Id.* at 3a.

Although the district court had also ruled that AI 2010 was a plausible interpretation of the 2004 regulations and thus was neither "arbitrary" nor "capricious," 5 U.S.C. § 706(2)(A), the D.C. Circuit's reversal nullified that ruling. The D.C. Circuit had no occasion to address the arbitrary-or-capricious issue, because the MBA did not raise it on appeal.

SUMMARY OF ARGUMENT

The only issue before the Court is whether the D.C. Circuit correctly determined that DOL violated the APA when it issued AI 2010 without first engaging in notice-and-comment rulemaking. The Questions Presented as framed by the two sets of Petitioners, by presenting a distorted version of the D.C. Circuit's *Paralyzed Veterans* rule, do not accurately reflect the issue decided below. Moreover, this case does not require the Court to address the *Paralyzed Veterans* rule in all its applications over the past two decades; rather, the Court need only decide whether the APA required notice-and-comment rulemaking in *this* case. The only plausible answer is that AI 2010 does *not* fit within the "interpretive rule" exception to § 553's notice-and-comment requirements and thus that DOL violated the APA when it issued AI 2010 without complying with those requirements.

Petitioners' "Questions Presented" fail to capture two limiting features of the *Paralyzed Veterans* rule. First, the rule does not apply unless the agency's initial statement is "definitive" or "authoritative." On numerous occasions, the D.C. Circuit has declined to apply *Paralyzed Veterans* because it concluded that the statement was not sufficiently definitive to be deemed

official agency policy. Second, the D.C. Circuit does not apply the rule unless the agency's later revision of its policy squarely conflicts with the policy articulated by the previous statement; *e.g.*, the revision can be explained only by a decision to repudiate a prior legal analysis and not by changed circumstances that caused agency officials to re-evaluate the wisdom of their prior position. Only when those two conditions are met does the D.C. Circuit conclude that "the agency has in effect amended" its regulations and therefore that the agency has issued a substantive rule to which § 553's notice-and-comment requirements apply. Pet. App. 2a.

In any event, the Court need not address whether the *Paralyzed Veterans* rule is a proper interpretation of the APA, because AI 2010 qualifies as a substantive rule for reasons unrelated to *Paralyzed Veterans*: it has the force and effect of law. Section 10(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a), creates a safe harbor for employers who decline to pay overtime compensation in reliance on any ruling or interpretation of DOL, even if the ruling or interpretation is later rescinded or determined by a court to be invalid. As the United States concedes, the 2006 Opinion Letter protected employers from liability for failure to pay overtime to mortgage loan officers, but that safe harbor ended "for compensation earned after [the] 2010 withdrawal" of the Opinion Letter. U.S. Certiorari Reply Br. at 5. Accordingly, DOL's issuance of AI 2010 had the force and effect of law: before its issuance, the § 259(a) safe harbor protected employers from liability for failing to pay overtime to their mortgage loan officers, but issuance of AI 2010 ended that legal protection. The Court has long recognized that rules having "the force and effect of

law" are substantive rules and thus are not exempt from notice-and-comment rulemaking. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 302 & n.31 (1979).

Moreover, the D.C. Circuit is correct that AI 2010 has the force and effect of law because it in essence amends the 2004 regulations. Particularly where, as here, an agency issues a "definitive" interpretation of a regulation soon after issuing the regulation itself, the general public has good cause to conclude that the interpretation reflects the agency's actual thinking at the time that it adopted the regulation. Accordingly, when the agency later issues a new rule that directly contradicts the prior interpretation without asserting any basis for the change other than disagreement with the interpretation's analysis, the new rule can legitimately be deemed substantive in nature. It may well be that the new rule is a plausible interpretation of the actual language of the underlying regulation—and thus is not subject to an arbitrary-and-capricious challenge. 5 U.S.C. § 706(2)(A). Moreover, an agency is entitled to alter its interpretation of the authorizing statute and its implementing regulations. But when, as here, its re-interpretation of existing regulations meets the criteria set forth in the *Paralyzed Veterans* rule, the substantive nature of any such re-interpretation implicates § 553's notice-and-comment requirements.

Finally, there is little evidence to suggest that the parade of horribles imagined by Petitioners will come to pass if the judgment below is affirmed. For one thing, *Paralyzed Veterans* has been the law for nearly 20 years within the circuit that handles the

lion's share of federal administrative law cases, yet Petitioners have produced no evidence that the rule has adversely affected the rulemaking process within federal agencies.

Moreover, *Paralyzed Veterans* does not dissuade agencies from providing the regulated community with helpful guidance regarding the meaning of the agencies' implementing statutes and regulations. An agency that is unsure regarding how a statute or regulation should be interpreted in a likely-to-occur factual situation is free to say just that; *e.g.*, "we hereby reserve the right to change our minds when the following factual situation arises, but our current thinking is that we will interpret those facts as not constituting a regulatory violation by a regulated entity."

Indeed, many federal agencies issue "guidance" documents that proceed in precisely that fashion. While regulated entities would probably prefer that such guidances provide binding safe harbors, they undoubtedly prefer receiving some caveated guidance to receiving no guidance whatsoever. And such guidances provide agencies with all the flexibility that Petitioners seek because a guidance document's equivocating language signals that the rule being adopted is not definitive, an agency need not worry that it will be forced to go through the lengthy notice-and-comment rulemaking process if it later determines that it wishes to alter its interpretation of the statute or regulation.

Finally, DOL needs to recognize that providing federal agencies with maximum flexibility is not the

sole objective of the FLSA and the APA. The public also has interests in participating in and enforcing the administrative process, and those interests—including an interest in the continuity of legal rules and in having a say in proposed rule changes—often run directly counter to an agency's desire for maximum flexibility. Congress has made clear that it expects the interests of both groups to be respected. *Amici* recognize that when a new Administration takes office, it is entitled to implement policies that differ substantially from its predecessor's, so long as the policies are consistent with the broad outline provided by Congress in enabling legislation. But requiring agencies to go through notice-and-comment rulemaking before reversing policies embodied in a rule that definitively explains the meaning of a regulation is not just fully consistent with § 553. Notice is an important rule-of-law value that enables affected entities to come into compliance in a reasonable time, rather than instantly. The opportunity to comment ensures that the interests of the general public are fully considered before a rule is reversed.

ARGUMENT

I. PETITIONERS MISCHARACTERIZE *PARALYZED VETERANS*; IT DOES NOT SEEK TO IMPOSE DUTIES ON AGENCIES THAT ARE NOT SET FORTH IN THE APA

Both sets of Petitioners characterize *Paralyzed Veterans* as an effort by the D.C. Circuit to impose procedural requirements on federal agencies conducting rulemaking that have no basis in the text of the APA. According to the United States, "The D.C.

Circuit's extra-textual requirement of notice-and-comment rulemaking for interpretive rules constitutes a 'serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" U.S. Br. at 12 (quoting *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 544 (1978)). *See also* Intervenor Petitioners Br. at 39 ("Whatever courts may think of the wisdom of agencies revising their informal interpretations, courts may not impose upon agencies additional procedural hurdles beyond those established by Congress."). Petitioners have mischaracterized the *Paralyzed Veterans* rule; the D.C. Circuit has repeatedly explained that the rule is based on its understanding of the APA's notice-and-comment requirements, set forth in 5 U.S.C. § 553. Nor has the appeals court ever stated that a rule can be subjected to notice-and-comment rulemaking requirements even though it qualifies as an "interpretive rule."

The decision below explained that *Paralyzed Veterans* established a narrow rule that the D.C. Circuit has only rarely invoked to invalidate agency action for failure to engage in notice-and-comment rulemaking. It described the "straightforward" rule as follows:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.

Id. at 2a (parenthetical in original) (quoting *Alaska*

Professional Hunters, 177 F.3d at 1034). By thus explaining that the *Paralyzed Veterans* rule was designed to implement notice-and-comment requirements imposed by "the APA," the court made plain that the rule is not "extra-textual" but rather is the D.C. Circuit's effort to apply § 553's notice-and-comment requirements[3] in one very specific context.[4]

In those instances in which the appeals court has invoked *Paralyzed Veterans* to invalidate a rule for failure to comply with notice-and-comment requirements, it has never suggested that those requirements could be imposed with respect to a rule that is an "interpretive rule" as defined by § 553: *See, e.g., Paralyzed Veterans*, 117 F.3d at 586; *Alaska*

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[3] 5 U.S.C. § 553 establishes as a general rule that notice of proposed rules be published in the Federal Register and that "interested persons" be afforded "an opportunity to participate in the rulemaking." The statute creates an exception: the notice-and-comment requirements do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b)(A).

[4] *Amici* find it ironic that Petitioners criticize *Paralyzed Veterans* for its imposition of an allegedly extra-textual procedural requirement, when they are urging the Court to adopt a different extra-textual rule that is more to their liking. Both the Intervenor-Petitioners, Br. at 10, and DOL, Pet. App. 51a-52a, assert that all of the FLSA's exemptions from coverage should be "narrowly construed" against the employer. That assertion finds zero support in the text of the FLSA. The Supreme Court case cited by Petitioners in support of their assertion, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960), is inapposite. That case focused exclusively on two provisions (subsequently repealed) that exempted employees of small, intrastate retail stores from FLSA coverage; it has no relevance to the administrative-capacity exclusion at issue here.

Professional Hunters, 177 F.3d at 1033-34 (expressly rejecting FAA's claim that the challenged rule "was merely an interpretive rule, exempt from the notice and comment requirements of APA § 553."). Indeed, virtually all of the D.C. Circuit cases cited by the United States in support of its claim that the appeals court has applied *Paralyzed Veterans* extra-textually, *see* U.S. Br. at 13-14, made no more than passing reference to *Paralyzed Veterans* and were decided on totally unrelated grounds.

Moreover, two limiting features imposed on the *Paralyzed Veterans* rule by the D.C. Circuit ensures that the rule will be applied narrowly. First, the rule does not apply if the agency has not issued a "definitive" or "authoritative" interpretation of its regulation. Thus, for example, in *Paralyzed Veterans* itself, the appeals court rejected the plaintiffs' § 553 claim because the statement on which the plaintiffs relied—a speech by a mid-level official of the agency—was not a "definitive" statement by the agency. 117 F.3d at 587. *See also MetWest Inc. v. Secretary of Labor*, 560 F.3d 506, 509-10 (D.C. Cir. 2009) (OSHA statement that using reusable blood tube holders "may" be permissible is not a "definitive statement.").

Second, *Hudson v. FAA*, 192 F.3d 1031 (D.C. Cir. 1999), makes clear that a revised interpretation of a regulation does not constitute the "significant revision" envisioned by *Paralyzed Veterans* if it merely re-interprets the regulation in light of changed circumstances. In *Hudson*, the Court rejected a *Paralyzed Veterans* challenge to a revised FAA

statement regarding aircraft safety, finding that the revisions merely reflected increased FAA access to safety data. 192 F.3d at 1035-36. In other words, *Paralyzed Veterans* applies only if the agency's later revision of its interpretation squarely conflicts with the policy articulated by the previous interpretation of the regulation. Only when those two conditions are met does the D.C. Circuit conclude that "the agency has in effect amended" its regulation and therefore that the agency has issued a substantive rule to which § 553's notice-and-comment requirements apply. Pet. App. 2a.

Petitioners do not contest that if an agency actually amends one of its formal regulations, it has adopted a "substantive" rule and thus must comply with notice-and-comment rulemaking. Moreover, this Court has repeatedly held that a rule can amount to the *de facto* amendment of a formal regulation even if an agency does not acknowledge that it has adopted an amendment. *See, e.g., Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (stating that "APA rulemaking would still be required if [the challenged rule] adopted a new position inconsistent with any of the Secretary's existing regulations."); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (declining to defer to an agency's interpretation of its own regulations that was not consistent with the regulatory language, because "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). In sum, *Paralyzed Veterans* is not an extra-statutory procedural requirement imposed on federal agencies but rather is based on the D.C. Circuit's conclusion that, under limited circumstances, a rule substantially revising a prior regulatory

interpretation should be deemed a substantive rule and thus subject to notice-and-comment rulemaking requirements.

II. AI 2010 WAS NOT AN "INTERPRETIVE RULE"; THUS, DOL ERRED IN FAILING TO COMPLY WITH § 553's NOTICE-AND-COMMENT REQUIREMENTS

A. A Rule Is "Interpretive" Only If It Does Not Have the Force and Effect of Law

Amici recognize that Courts have great difficulty distinguishing between substantive rules and interpretive rules; the APA itself provides definitions for neither term. Case law nonetheless identifies several characteristics that a rule must possess in order to qualify as interpretive and thus exempt from § 553's notice-and-comment requirements.

First, an agency regulation is not interpretive if it has "the force and effect of law" or is one "affecting individual rights and obligations." *Chrysler Corp.*, 441 U.S. at 302. The Court has cited with approval the distinction drawn between administrative and interpretive rules in the Attorney General's Manual on the Administrative Procedure Act (1947), drafted immediately after adoption of the APA:

> The Manual refers to substantive rules as rules that "implement" the statute. "Such rules have the force and effect of law." Manual, *supra*, at 30 n.3. In contrast, it suggests that "interpretive rules" and "general statements of

> policy" do not have the force and effect of law. Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Ibid.*

Chrysler Corp., 441 U.S. at 302 n. 31. *See also id.* at 295 (stating that "it has been established in a variety of contexts that properly promulgated, substantive agency regulations have 'the force and effect of law.'").

More recently, the Court has described an interpretive rule as one that "may be used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007). When an agency issues a rule that is within the "gap-filling authority" issued to it by Congress, the rule is deemed substantive and is entitled to deference from courts. *Id.* at 173. In contrast, interpretive rules are not entitled to deference. *Ibid.* The Court explained that one important factor in determining whether a rule is substantive and thus entitled to deference is whether it "sets forth important individual rights and duties." *Ibid.* Of course, since an interpretive rule is not entitled to deference from the courts, the fact that an agency has a record of urging courts to defer to one of its rules suggests that the agency itself considers the rule to be substantive.

The preceding discussion illustrates that the definition of "interpretive rule" for purposes of the § 553 exception is far narrower than the word "interpretive" might suggest. In one sense, *every* rule or regulation issued by an agency is "interpretive" in

that they all attempt to translate the mandate granted to the agency by Congress into a workable set of operational standards. But Congress did not use "interpretive" in that broad sense when it created the interpretive rule exception to § 553's notice-and-comment requirements; a mere assertion that a rule was adopted for the purpose of providing an agency's interpretation of a statute or regulation is insufficient to classify it as an interpretive rule under § 553. To the contrary, a rule is interpretive only if it does *not* have the force and effect of law, does *not* set down "important rights and duties," and is *not* one for which the agency demands deference from the courts. Morever, a rule does not qualify as interpretive merely because an agency labels it as such. *Ibid.* (holding that an agency rule was substantive even though its heading read, "Interpretations."); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997).

B. AI 2010 Is a Substantive Rule Because It Has the Force and Effect of Law; Among Other Things, It Eliminates a Safe-Harbor Protection Previously Available to Employers

When examined under the above criteria, AI 2010 is properly classified as a substantive rule and thus is subject to § 553's notice-and-comment requirements. AI 2010 has the force and effect of law. Moreover, DOL issued AI 2010 in the exercise of its gap-filling functions under the FLSA; the rule "sets forth important individual rights and duties" of employees and employers in the financial services industry. Accordingly, the Court should affirm the decision below, without regard to its views on whether

the *Paralyzed Veterans* rule is a proper interpretation of the APA.

That AI 2010 has the force and effect of law is best illustrated by its effect on an FLSA safe harbor created for employers by the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.* Section 10 of the Act, 29 U.S.C. § 259, states that no employer sued for alleged FLSA violations "shall be subject to any liability" for failing to "pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith conformance with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of" the Administrator of DOL's Wage and Hour Division. 29 U.S. C. § 259(a) and (b)(1).[5] Section 259(a) states that the safe harbor bars liability even if, after such act or omission, the agency guidance is "modified or rescinded" or is "determined by judicial authority to be invalid or of no legal effect."

Section 259 is plainly implicated by the Administrator's issuance of the Opinion Letter in 2006 and his precipitous 2010 withdrawal of that letter in connection with AI 2010. As the United States concedes, the Opinion Letter provides employers with a safe harbor from liability for any failure to provide

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[5] The Portal-to-Portal Act was adopted based on congressional findings that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers." 29 U.S.C. § 251.

overtime pay to mortgage loan officers during the four years that it was in effect. U.S. Certiorari Reply Br. at 5. The United States further concedes that the safe harbor ended the moment AI 2010 was issued; those employers were no longer immune from liability for failure to pay overtime "for compensation earned after [the] 2010 withdrawal" of the Opinion Letter by AI 2010. *Ibid.*

Based on the foregoing, one must conclude that DOL's issuance of AI 2010 had the force and effect of law: before its issuance, the § 259(a) safe harbor protected employers from liability for failing to pay overtime to their mortgage loan officers, but issuance of AI 2010 ended that legal protection. Accordingly, AI 2010 is a substantive rule subject to § 553's notice-and-comment requirements. That conclusion is not altered by Intervenors-Petitioners' assertion that the 2006 Opinion Letter is itself a substantive rule and is thus invalid because it too was issued without notice-and-comment rulemaking. Intervenors Br. at 54-55. Section 259(a) provides that the Portal-to-Portal Act provides a safe harbor without regard to whether the document the employer has relied upon in failing to pay overtime is later "determined by judicial authority to be invalid or of no legal effect." In other words, AI 2010 has the force and effect of law—and is thus a substantive rule— without regard to whether the 2006 Opinion Letter was validly issued.

AI 2010 is a substantive rule for the additional reason that it is an exercise of DOL's gap-filling function and "sets forth important individual rights and duties" of employees and employers in the financial services industry. *Long Island Care*, 551 U.S.

at 173. That AI 2010 serves a gap-filling function is best illustrated by examining the statute and regulations describing the administrative-functions exception to the FLSA's overtime pay requirement. The relevant statute, 29 U.S.C. § 213(a)(1), provides no guidance regarding the proper scope of the exemption for "any employee employed in a bona fide executive, administrative, or professional capacity." Indeed, it explicitly directs DOL to fill the gaps, explaining that the terms "bona fide executive, administrative, or professional capacity" are to be "defined and delimited from time to time by regulations of the Secretary" of DOL, subject to the provisions of the APA. *Id.*

The regulations that are principally relevant to this case, 29 C.F.R. §§ 541.200 & 541.203, fill in some of the gaps. But they do not explicitly answer the legal question of greatest interest to the MBA's members: are mortgage loan officers subject to the FLSA's overtime pay requirements? That is the question that AI 2010 answers, and it does so in a manner that "sets forth important individual rights and duties" of employees and employers in the financial services industry. Accordingly, AI 2010 is a substantive rule.

The United States no doubt would respond that AI 2010 is an interpretive rule because its principal purpose is to interpret the manner in which the administrative exemption regulations apply to mortgage loan officers. But that argument is belied by the language of AI 2010 and events leading up to its adoption. Much of AI 2010 focuses not on the actual language of DOL regulations but on DOL's understanding of the pre-2004 history of FLSA

enforcement in this area, thereby undercutting any claim that AI 2010 merely interprets the words used in the regulations. Indeed, in order to arrive at its "no exemption" conclusion, AI 2010 was required to ignore language in the regulations suggesting that mortgage loan officers qualified as administrative employees and instead base its decision on an atextual discussion of what constitutes sales activities.[6] In doing so, DOL plainly was exercising its prerogative to fill in the gaps left by the FLSA and implementing regulations, and to "set forth important individual rights and duties" of employees and employers—not merely interpreting words appearing in its regulations.

Finally, as Respondents point out, Resp. Br. at 47, the United States has filed *amicus* briefs in recent FLSA litigation in support of its new position that mortgage loan officers are not administratively exempt from the FLSA's overtime provisions. In those briefs,

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[6] While both the 2006 Opinion Letter and AI 2010 may be sufficiently plausible to survive arbitrary-and-capricious review, *amici* view the 2006 Opinion Letter as a much more plausible interpretation of the 2004 regulations. AI 2010 arrived at its "no exemption" conclusion by focusing on 29 C.F.R. § 541.200 (which sets forth the "general rule for administrative employees") and by largely ignoring 29 C.F.R. § 541.203(b) (which provides examples of the administrative exemption as applied to "employees in the financial services industry"). Pet. App. 68a. Those examples strongly suggest that mortgage loan officers are administratively exempt from the FLSA's overtime provisions. AI 2010 justified its decision to ignore § 541.203(b) because, it asserted, the regulation's "guidance cannot result in it 'swallowing' the requirements of 29 C.F.R. § 541.200." *Id.* But canons of statutory and regulatory construction usually operate in the opposite direction. *See, e.g., Carley v. United States*, 556 U.S. 303, 305 (2009) ("a more specific statute [is] given precedence over a more general one.").

the United States has argued that AI 2010 is entitle to deference from the courts under *Auer v. Robbins*, 519 U.S. 452 (1997). As noted above, this Court has made clear that interpretive rules are not entitled to *Auer* deference. *Long Island Care*, 551 U.S. at 173. Accordingly, the United States's assertion that AI 2010 is entitled to *Auer* deference is a strong indication that the United States deems AI 2010 a substantive rule, not an interpretive rule.

C. AI 2010 Is a Substantive Rule Because, Under *Paralyzed Veterans*, It in Effect Has Amended DOL Regulations

The decision below should also be affirmed on its own terms: the D.C. Circuit correctly concluded that AI 2010 effectively amended the 2004 regulations, and thus that AI 2010 is a substantive rule subject to § 553's notice-and-comment requirements.

Amici note initially that there is no dispute that the 2006 Opinion Letter was a "definitive" interpretation of the 2004 regulations governing the administrative employee exemption as applied to mortgage loan officers. The Opinion Letter concluded unequivocally that workers performing the typical duties described in the MBA's inquiry letter were "exempt administrative employees" under the FLSA and implementing regulations. Pet. App. 70a. Given that the Opinion Letter was issued so soon after issuance of the 2004 regulations and was drafted by the same Administration responsible for drafting the regulations, there is every reason to conclude that the Opinion Letter accurately conveyed the views

expressed by DOL in its regulations.

A change in administrations took place in 2009, and—in light of the broad discretion granted by Congress to DOL to administer the FLSA—the new administration was entitled to adopt new FLSA enforcement policies. But there can be no serious dispute that the new enforcement policy embodied in AI 2010 was a 180-degree pivot from the policy articulated in the Opinion Letter. AI 2010 did not assert that its conclusion—that mortgage loan employees are *not* administratively exempt from the overtime pay requirement—was based on any change in circumstances or on the gathering of new data regarding the how mortgage loan officers spend the majority of their work days. Rather, AI 2010 simply disagreed with the Opinion Letter's conclusion that the sorts of work performed by typical mortgage loan officers indicate that "they have a primary duty other than sales." Pet. App. 78a. Based on the same evidence, AI 2010 concluded that "mortgage loan officers typically have the primary duty of making sales on behalf of their employer." *Id.* at 68a.

Under those circumstances, the D.C. Circuit correctly concluded that AI 2010 did not simply reverse the interpretation set forth in the Opinion Letter, but also amended the regulations with which the Opinion Letter was so closely identified. As the appeals court explained in *Paralyzed Veterans*:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "*repeals*" or "*amendments*." *See* 5 U.S.C. § 551(5). To allow

> an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulations."

Paralyzed Veterans, 117 F.3d at 586 (quoting *Guernsey Memorial*, 514 U.S. at 100).

The United States challenges the assertion that agency action falling within the narrow confines of *Paralyzed Veterans* constitutes the *de facto* amendment of a regulation. It asserts, "An agency interpretation no more 'amends' a legislative regulation than a judicial interpretation 'amends' the source of the law it interprets." U.S. Br. at 30. The analogy to judicial review is not well taken. When construing a statute, courts are not authorized to make substantive law; rather, they are tasked with attempting to discern congressional intent on the basis of the statutory language. Administrative agencies, on the other hand, have been delegated responsibility to use their expertise for the purpose of making substantive law where needed to plug gaps in the congressional mandate. The principal embodiment of the substantive law created by an agency are its formal regulations. Over time, those regulations acquire commonly understood meanings. Agencies are, of course, free to amend their own regulations. But when they amend that substantive law, the APA requires that they abide by § 553's notice-and-comment requirements. And the reversal of a long-held, definitive interpretation of

existing regulations "amends" the substantive law just as assuredly as does a formal amendment of the regulatory language.

III. THE *PARALYZED VETERANS* RULE DOES NOT INTERFERE WITH THE EFFICIENT OPERATION OF REGULATORY AGENCIES

Petitioners complain that affirming the decision below will create a strong incentive for agencies to avoid providing the public with guidance regarding how their regulations are to be interpreted. According to the United States:

> The *Paralyzed Veterans* doctrine inherently creates a significant disincentive to providing administrative guidance to the public in the first instance, lest such agency statements trigger the D.C. Circuit's requirement of notice-and-comment rulemaking for any future revisions. That disincentive flows directly from the D.C. Circuit's governing precedents and contravenes Congress's goal of affirmatively *encouraging* agencies to issue interpretive rules that inform the public of the agencies' understanding of the programs they administer.

U.S. Br. at 25. Those concerns are overblown. Moreover, they overlook the many advantages the public derives from a robust notice-and-comment rulemaking regime.

We note initially that *Paralyzed Veterans* has been the law for nearly 20 years within the D.C.

Circuit, the federal circuit that handles the lion's share of federal administrative law cases. Yet Petitioners have produced no evidence that the rule has adversely affected the rulemaking process within federal agencies. One can reasonably assume that if *Paralyzed Veterans* really were having the adverse effects that Petitioners posit, evidence of those effects would have come to light by now.

Petitioners' fear is premised on the inaccurate notion that virtually *any* guidance provided by an agency could end up restricting the agency's future flexibility if *Paralyzed Veterans* is invoked to require that amendments to the guidance be effected only through cumbersome notice-and-comment rulemaking. But as noted above, *Paralyzed Veterans* is not nearly so broadly applicable. It has no conceivable application unless the initial guidance is a "definitive" interpretation of the regulation. Even then, notice-and-comment rulemaking is not required for any revised interpretations if the revision merely reinterprets the regulation in light of changed circumstances. *Hudson*, 192 F.3d at 1035-36. Indeed, significant policy reversals of the sort likely to implicate *Paralyzed Veterans* are most likely to arise when, as here, control of the Executive Branch has switched from one political party to another. Senior agency personnel are unlikely to avoid issuing interpretive documents based on a belief that doing so might make it more difficult for officials in the next Administration to revise those interpretations. To the contrary, such a belief might prompt senior agency personnel to issue more guidance documents precisely because they may wish to make it more difficult for those in the opposing political party to revise

incumbent policies.

Moreover, the D.C. Circuit has expressly held that interpretations are insufficiently "definitive" to implicate *Paralyzed Veterans* if they include conditional or qualified language. *MetWest*, 560 F.3d at 509-10 (stating, "We have held that conditional or qualified statements, including statements that something 'may' be permitted, do not establish definitive and authoritative interpretation."). Accordingly, any agency that has some doubts about its proposed interpretation and fears getting locked into that interpretation can alleviate those concerns by including conditional language in its guidance.

Indeed, many agencies routinely issue guidance documents that state up front that while the document contains the agency's current thinking on the subject, it makes no promises that it will adhere to those views in future enforcement actions. *See, e.g.*, Food and Drug Administration, *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (2009). The very first paragraph of this FDA guidance document includes conditional and qualifying language, like that found in numerous FDA documents:

> This guidance document represents the Food and Drug Administration's current thinking on this topic. It does not create or confer any rights for or on any person, and does not operate to bind FDA or the public.

While regulated entities would probably prefer that such guidances provide binding safe harbors, they undoubtedly prefer receiving some caveated guidance to receiving no guidance whatsoever. And such guidances provide agencies with all the flexibility that Petitioners seek.

Finally, DOL needs to recognize that providing federal agencies with maximum flexibility is not the sole objective of the FLSA and the APA. The public also has interests in the administrative process, and those interests—including an interest in the continuity of legal rules and in having a say in proposed rule changes—often run directly counter to an agency's desire for maximum flexibility. In adopting the APA, Congress made clear that it expects the interests of both groups to be respected. *See, e.g.*, Attorney General's Manual at 9 (establishing procedural fairness in agency matters is "the overriding goal" of the APA). DOL may complain about the burdensomeness of engaging in notice-and-comment rulemaking, but Congress made plain its belief that DOL was up to the task when it ordered DOL to write detailed regulations implementing the FLSA. *See Guernsey Memorial*, 514 U.S. at 109-110 (O'Connor, J., dissenting).

CONCLUSION

Amici curiae request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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